

17165
116

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 368.

DETROIT STEEL COOPERAGE COMPANY, PETITIONER,

vs.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H.
SKAGGS, F. HOGENMILLER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 23, 1912.

CERTIORARI AND RETURN FILED NOVEMBER 21, 1912.

(23,400)

(23,400)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 368.

DETROIT STEEL COOPERAGE COMPANY, PETITIONER,

vs.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H.
SKAGGS, F. HOGENMILLER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Original.	Print
Caption	a	1
Transcript from the circuit court of the United States for the northern district of West Virginia.....	1	1
Caption	1	1
Bill of complaint.....	2	2
Exhibit A—Proposal and specification.....	23	20
B—Copy of bill in Hartman case.....	28	24
C—Decree of sale in Hartman case.....	35	31
D—Advertisement of sale in Hartman case....	38	33
Order of December 22, 1909 (restraining order).....	39	33
Subpoena in chancery and returns.....	40	35
Answer of G. W. Hartman and Bollinger Bros.....	42	37
Replication	53	46
Alias subpoena and returns.....	53	46
Affidavit for warning order, March 14, 1910.....	55	47
Warning order and return of service, March 14, 1910.....	56	49
Affidavit for second warning order, April 14, 1910.....	58	51
Warning order and return of service, April 14, 1910.....	60	52

	Original. Print	
Appearance of F. Hogenmiller.....	62	54
Demurrer of F. Hogenmiller.....	62	54
Order of June 28, 1910, overruling demurrer, etc.....	63	54
Plaintiff's depositions	64	56
Testimony of Henry C. Weideman.....	65	56
John McConnell	83	74
Frank J. Huettelman.....	88	78
Hugo Bloquelle	91	82
Warren L. Fisk.....	93	84
Exhibits	102	93
W. L. Fisk Nos. 1 and 2—Copies of notes.....	102	93
H. C. W. Nos. 1 and 2—Copies of letters.....	103	94
H. C. W. No. 3—Proposal.....	105	95
Defendants' Nos. 4, 5, and 6—Letters.....	110	99
Defendants' depositions	112	101
Testimony of Sidney W. Bollinger.....	113	101
Konrad Kell	136	126
Frank Regan	144	133
Louis Meyers	153	142
Exhibit "A"—Blue print of brewery plan.....	158	146
Plaintiff's depositions	159	147
Testimony of C. R. Kerr.....	159	149
Albert Burkart	161	154
Warren L. Fisk.....	166	157
Carl H. Roger.....	169	157
Exhibit "Record"—Copies of files in Hartman case.....	186	175
Bill of complaint.....	186	175
Exhibits A to G, filed with bill.....	194	182
Subpoena	197	185
Injunction	199	186
Petition for receiver.....	201	188
Affidavit of "brewmaster".....	202	190
Decree appointing receiver.....	204	191
Appearance of City of Sistersville.....	206	193
Decree of sale and reference.....	207	194
Petition of Detroit Steel Cooperage Co.....	209	196
Order staying reference.....	212	199
Order directing separate bids to be taken, &c.	213	200
Resignation of John S. Sell, trustee.....	214	200
Report of sale.....	215	201
Decree confirming sale.....	222	207
Petition of receiver to pay taxes.....	224	209
Order for payment of taxes.....	228	213
Clerk's certificate	229	213
Exhibit "AA"—Deed of trust to John S. Sell, trustee.....	229	214
"AB"—Deed of trust to Abijah Hays, trustee.....	242	225
"AC"—Deed of trust to Carl Benz, trustee.....	247	229
"AD"—Lien record of J. H. McCoy.....	253	234
"AE"—Lien record of Feuchtwanger Bros.....	254	235
"C. H. K. No. 1"—Photograph of brewery.....	255	235
"C. H. K. No. 2"—Photograph of brewery.....	256	235

INDEX.

iii

	Original.	Print
Final decree of October 17, 1911.....	257	236
Petition for appeal.....	258	237
Assignment of errors.....	259	237
Appeal bond and approval.....	262	240
Order allowing appeal.....	264	242
Order enlarging time to complete transcript of record.....	265	242
Clerk's certificate	266	243
Docket entries	267	243
Opinion	269	244
Decree	277	249
Petition for rehearing.....	279	250
Order staying mandate.....	301	264
Order denying rehearing.....	301	264
Opinion on petition for rehearing.....	302	265
Petition for further stay of mandate.....	303	266
Order further staying mandate.....	305	268
Clerk's certificate	306	268
Stipulation as to return to writ of certiorari.....	307	269
Return to writ of certiorari.....	308	269
Writ of certiorari.....	310	270

a TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,
versus

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H. SKAGGS, F.
HOGENMILLER et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern
District of West Virginia, at Wheeling.

Filed December 9, 1911.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA,
Northern District of West Virginia, To wit:

At a Circuit Court of the United States for the Northern District of
West Virginia, begun and held at the Court House in the City of
Wheeling, on the third Tuesday of October, being the 17th day of
the same month, in the year of our Lord one thousand nine hun-
dred and eleven.

Present: The Honorable Alston G. Dayton, Judge of the District
Court of the United States for the Northern District of West Vir-
ginia, and as such one of the judges of this Court.

Among other proceedings were the following, to-wit:

In Equity. No. 162.

DETROIT STEEL COOPERAGE COMPANY, a Corporation, Complainant,
vs.

SISTER-VILLE BREWING COMPANY, a Corporation; GALE JUSTUS,
R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel
J. O'Neil, Clem Polen, H. B. Shriver, ex-Sheriff of the County of
Tyler, in the State of West Virginia; City of Sistersville, William
E. Cummins, as Collector and Treasurer of said City of Sistersville;
John S. Sell, as Trustee; J. Hanford McCoy, in His Own Right
and as Receiver of said Brewing Company; Abijah Hays, as Trus-
tee; W. H. Kirk, Charles Claus, as Trustee; Carl Benz, Henry
Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger,
George W. Hartman, Bollinger Brothers, a Corporation; County
Court of Tyler County, West Virginia, Defendants.

Bill of Complaint.

Filed Dec. 22, 1909.

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

In the Circuit Court of the United States for the Northern District
of West Virginia.

To the Honorable the Judges of the Circuit Court of the United
States for the Northern District of West Virginia, in equity
sitting:

Your orator, Detroit Steel Cooperage Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, having its principal office and place of business in the City of Detroit, in the County of Wayne, and State of Michigan, and a resident and citizen of the State of Michigan, brings this its Bill of Complaint against Sistersville Brewing Company (hereinafter called said Brewing Company), a corporation organized and existing under and by virtue of the laws of the State of West Virginia, having its principal office and place of business in the City of Sistersville, in the County of Tyler and State of West Virginia, and a resident and citizen of the State of West Virginia, Gale Justus, a resident and citizen of the State of West Virginia, residing in the county of Tyler in the State of West Virginia, R. H. Skaggs, a resident and citizen of the State of West Virginia, residing in the county of Tyler in the State of West Virginia, F. Hogenmiller, a resident and citizen of the State of West Virginia, residing in the County of Tyler, in the State of West Virginia, G. M. Beaver, a resident and citizen of the State of West Virginia, residing in the county of Tyler, in the State of West Virginia, A. Osman, a resident and citizen of the State of West Virginia, residing in the County of Tyler, in the State of West Virginia, Daniel J. O'Neil, a resident and citizen of the State of West Virginia, residing in the County of Tyler, in the State of West Virginia, Clem Polen, a resident and citizen of the State of West Virginia, residing in the County of Tyler, in the State of West Virginia, H. B. Shriver, a resident and citizen of the State of West Virginia, residing in the County of Tyler, in the State of West Virginia, ex-sheriff of the County of Tyler, in the State of West Virginia, City of Sistersville, a municipal corporation organized and existing under and by virtue of the laws of the State of West Virginia, and a resident and citizen of the State of
3 West Virginia, situate in the County of Tyler, in the State of West Virginia, William E. Cummins, a resident and citizen of the State of West Virginia, residing in the City of Sistersville, in the County of Tyler and State of West Virginia, as collector and treasurer of said City of Sistersville, John S. Sell, a resident and citizen of the State of Pennsylvania, residing in the Borough of Greensburg, in the County of Westmoreland and State of Pennsyl-

vania, as trustee, J. Hanford McCoy, a resident and citizen of the State of West Virginia, residing in the City of Sistersville, in the County of Tyler and State of West Virginia, in his own right, and as receiver of said Brewing Company, Abijah Hays, a resident and citizen of the State of Pennsylvania, as trustee, W. H. Kirk, a resident and citizen of the State of Pennsylvania, residing in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, Charles Claus, a resident and citizen of the State of Pennsylvania, residing in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, as trustee, Carl Benz, a resident and citizen of State of Pennsylvania, residing in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, Henry Feuchtwanger, a resident and citizen of the State of Pennsylvania, residing in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, Joseph Feuchtwanger, a resident and citizen of the State of Pennsylvania, residing in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, Aaron Feuchtwanger, a resident and citizen of the State of Pennsylvania, residing in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, George W. Hartman, a resident and citizen of the State of Pennsylvania, residing in the Borough of McKeesport, in the County of Allegheny and State of Pennsylvania, Bollinger Brothers, otherwise called Bollinger Bros., a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, and a resident and citizen of the State of Pennsylvania, and the County Court of Tyler County, West Virginia, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and a resident and citizen of the State of West Virginia.

And thereupon your orator complains and says that said Brewing Company is the owner of a certain tract or parcel of land containing seven hundred and forty-one thousandth- (.741) of an acre, together with certain buildings, fixtures, machinery, appliances and other property, constituting a valuable brewery, thereon situate, lying and being in said City of Sistersville, in the County of Tyler and State of West Virginia.

4 Your orator further says that on or about the 8th day of August, 1908, by an agreement in writing made and entered into by and between said Brewing Company and your orator, your orator agreed to construct and furnish to said Brewing Company, and to erect in said brewery, thirteen chip casks or tanks, each of eleven of which tanks were to be provided with the following fixtures and fittings, to-wit: eight cast iron adjustable floor stands, one inside swinging manhole door in lower ring, enameled on inside, one one and one-half inch lever handle straightway cock in lower ring near bottom, one trycock in second ring, one three inch connection in center of head with cap tapped for bung cock, one special double bung cock, one one and one-half inch connection in center of bottom with a one and one-half in. copper tinned pipe to extend to outside of

rim, which pipe was to be provided with a one and one-half inch brass straightway cock, and one special brass strainer for above connection to go inside of tank, and each of the two other of which tanks were to be provided with like fixtures and fittings, except that said two tanks were to be provided with seven cast iron adjustable stands, instead of eight cast iron adjustable stands; that in consideration thereof, said Brewing Company, in and by said agreement in writing, agreed to pay unto your orator the sum of five thousand four hundred and eighty (\$5,480.00) dollars, of which the sum of two thousand (\$2,000.00) dollars was to be paid when all of the tanks had been shipped, and the further sum of seven hundred and forty (\$740.00) dollars was to be paid when said tanks, fixtures and fittings were erected at said brewery and tested, and for the further sum of two thousand seven hundred and forty (\$2,740.00) dollars said Brewing Company was to execute a promissory note, payable in three months from date with interest at the rate of six per centum per annum; that it was in and by said agreement in writing, among other things, expressly agreed and understood by and between your orator and said Brewing Company, that the title and ownership of all the tanks and fixtures covered by said agreement should remain in your orator until the payments as therein specified, and any notes and acceptances that might be given on account of any such payments, should have been fully paid, and that in case of default in any of said payments, notes or acceptances, your orator should have the right at its option to take possession of and remove said tanks and fixtures; a copy of which agreement in writing is hereto annexed, made part of this bill, and marked, "Exhibit A."

Your orator further says that your orator did construct and furnish to said Brewing Company, and did erect in said Brewery, in accordance with said agreement, said tanks, fixtures and fittings, and did fully and in all respects fulfill and perform all of the
5 promises, undertakings and agreements in and by said agreement contained, by or on the part of your orator to be fulfilled or performed.

Your orator further says that on or about the 7th day of August, 1908, said Brewing Company executed to your orator, in accordance with its said agreement, a promissory note for the principal sum of two thousand seven hundred and forty (\$2,740.00) dollars, payable three months after the date thereof, with interest at the rate of six per centum per annum, and on or about the 18th day of August, 1908, said Brewing Company paid to your orator, on account of the price of said tanks, fixtures and fittings, the sum of one thousand (\$1,000.00) dollars; that thereafter, on or about the 1st day of December, 1908, said promissory note being then unpaid, and no payments, other than said sum of one thousand (\$1,000.00) dollars having been made on account of said price or otherwise under said agreement, said promissory note was re-delivered to said Brewing Company, and, said Brewing Company being then indebted to your orator in the sum of four thousand five hundred and thirty-one and 15/100 (\$4,531.15) dollars, for and on account of the price of said tanks, fixtures and fittings, under said agreement, including accrued

interest to said date, said Brewing Company made, executed and delivered to your orator, to evidence said indebtedness, said Brewing Company's two promissory notes, each bearing date the 1st day of December, 1908, and payable ninety days after the dates thereof to the order of your orator, at Peoples State Bank, Detroit, Michigan, without defalcation, with interest at the rate of six per centum per annum, one of said notes being for the principal sum of two thousand five hundred and thirty-one and 15/100 (\$2,531.15) dollars, and the other of said notes being for the principal sum of two thousand (\$2,000.00) dollars; that your orator at all times since has been and still is the owner and holder of said two last mentioned notes; that neither said Brewing Company, nor any other person, firm or corporation, has paid said notes, or either of them, or any part thereof, either as to principal or interest; and that said Brewing Company is indebted to your orator, for and on account of the price of said tanks, fixtures and fittings, so evidenced by said notes, including interest accrued to the 1st day of December, 1909, in the sum of four thousand eight hundred and three and 2/100 (\$4,803.02) dollars.

Your orator further says that on the 7th day of December, 1908, at six o'clock in the afternoon, said agreement in writing, so reserving, as aforesaid, the title and ownership in and to your orator of and to said tanks, fixtures and fittings, was duly recorded in the office of the Clerk of the County Court of the County of Tyler, in the State of West Virginia, in Deed of Trust Book Number 6 13, page 346, as by the certificate of said Clerk, indorsed on said agreement in writing, more fully appears; that said tanks, fixtures and fittings at all times since their erection, as aforesaid, have been, and still are, and were at the time of said recordation, in said brewery, in said City of Sistersville, in the County of Tyler, and State of West Virginia.

Your orator further says that, on or about the 1st day of December, 1906, said Brewing Company made, executed and delivered to the defendant, John S. Sell, as trustee, (by the name and description of John S. Sell, Cashier of Westmoreland National Bank, of Greensburg, Pennsylvania, trustee) a certain deed of trust in the nature of a mortgage, which deed of trust recited the intention of said Brewing Company to issue its eighty bonds for the aggregate principal sum of forty thousand (\$40,000.00) dollars, and each for the principal sum of five hundred (\$500.00) dollars, bearing date the 1st day of December, 1906, with interest payable semi-annually, to be issued in seven series, including ten bonds of the aggregate principal sum of five thousand (\$5,000.00) dollars, was to become due and payable on the 1st day of December, 1909, and the remaining series were to become due and payable on subsequent dates therein specified, and in and by which said deed of trust said Brewing Company purported to convey to said John S. Sell, as trustee, said tract or parcel of land hereinbefore mentioned, together with the brewery building, machinery and appliances thereon erected or to be erected, with all the appurtenances thereto belonging or in any wise appertaining, and together with the corporate rights and priv-

illeges of the said Brewing Company, for the use, benefit and security as therein mentioned of the persons who might become the holders of said bonds intended to be thereby secured, or any of them, without preference, priority or distinction whatever; and that said deed of trust was recorded in the office of the clerk of the County Court of said County of Tyler, on the 2nd day of February, 1907, in Trust Deed Book Number 13, page 7, prior to the making of the agreement hereinbefore mentioned between your orator and said Brewing Company, and prior to the construction, furnishing and erection of the tanks, fixtures and fittings aforesaid, by your orator; a certified copy of which deed of trust, your orator is ready to produce in court here, when and as this court shall direct.

Your orator further says that it is informed and believes and on information and belief charges the fact to be, that certain of the bonds in said deed of trust mentioned were issued by said Brewing Company and are outstanding and unpaid, and that the defendants,

George W. Hartman and Bollinger are the holders of certain
7 of said bonds, but as to the consideration for the issue of said bonds, or the number or amount of said bonds issued, outstanding or unpaid, your orator has no knowledge.

Your orator further says that said Deed of Trust was executed by said Brewing Company before or during the construction of said brewery, and long before the completion thereof, and your orator is informed and believes, and on information and belief charges the fact to be, that said John S. Sell, as trustee, well knew before and at the time of the execution of said Deed of Trust, and before the issue of any of said bonds, that in and for the construction or completion of said Brewery, said Brewery Company necessarily would purchase on credit such equipment and appliances as said tanks, fixtures and fittings furnished by your orator, securing the payment of the purchase money therefor by permitting the vendors to reserve title to the property purchased.

Your orator further says that it is informed and believes and on information and belief charges the fact to be, that said Hartman and Bollinger Brothers were active, and among the leading promoters of the organization of said Brewing Company, and the construction and equipment of said brewery, and acquired their bonds directly from said Brewing Company, and that said Hartman and said Bollinger Brothers well knew, before and at the time of the execution of said Deed of Trust, and of the issue to and acquisition by them of their said bonds, that in and for the construction or completion of said brewery, said Brewing Company had purchased, or necessarily would purchase, on credit, such equipment and appliances as said tanks, fixtures and fittings securing the purchase money therefor by permitting the vendors to reserve title to the property purchased.

Your orator further says that after the execution of said deed of trust to said John S. Sell, as trustee, but before the making of said agreement between your orator and said Brewing Company, and before your orator constructed, furnished and erected said tanks, fixtures and fittings, said Brewing Company executed another deed

of trust, bearing date on the 1st day of August, 1907, in and by which said Brewing Company purported to convey to the defendant, Abijah Hays, as trustee, said tract or parcel of land, together with the buildings and structures then located thereon, or which might be thereafter erected thereon, and in addition thereto all machinery, both fixed and movable, fixtures, appliances, implements and appurtenances of every description which were then owned or might be thereafter acquired by said Brewing Company and used or provided for use, in the operation of its plant, or carrying on its business, including engines, boilers, ice and refrigerating machines or plants, tanks, casks, cooperage, brewing kettles and utensils, bottling house machinery of every description and all wagons and horses owned by said Brewing Company and used in carrying on its business, in trust to secure to said defendant, W. H. Kirk, the payment of a certain promissory note for the principal sum of ten thousand dollars, executed by said Brewing Company to said Kirk, which deed of trust thereafter, on the 21st day of September, 1907, and prior to the making of said agreement between your orator and said Brewing Company, and prior to the construction, furnishing and erection of said tanks, fixtures and fittings by your orator, was recorded in the office of the Clerk of the County Court of Tyler County, in Trust Deed Book Number 13, page 135, and a certified copy thereof your orator is ready to produce in court here, when and as this Court shall direct; that said deed of trust remains undeleased of record in said office, and your orator is informed and believes, and on information and belief charges the fact to be, that said promissory note thereby secured, and every part thereof, is and remains unpaid.

Your orator further says that said defendant, W. H. Kirk was the Secretary of said Brewing Company before and at the time of the making of said agreement between your orator and said Brewing Company for the construction, furnishing and erection of said tanks, fixtures and fittings, and in and by which the title thereto was reserved, as aforesaid, and that said Kirk not only consented to said agreement and the reservation of such title, but, acting as such secretary, accepted and signed said agreement for and on behalf of said Brewing Company, and your orator says that said Kirk is estopped to claim priority of said deed of trust, executed for his security, over or against your orator's said reservation of title, and that, in equity, said reservation of title is entitled to priority over said deed of trust, as to said tanks, fixtures and fittings.

Your orator further says that said last mentioned deed of trust was executed by said Brewing Company during the construction, and long before the completion, of said brewery, and your orator is informed and believes, and on information and belief charges the fact to be, that Abijah Hays, as trustee, and said Kirk well knew before and at the time of the execution of said deed of trust and of the making of the note thereby secured, that in and for the construction and completion of said Brewery said Brewing Company necessarily would purchase on credit such equipment and appli-

ances as said tanks, fixtures and fittings furnished by your orator, securing the payment of the purchase money therefor by permitting the vendors to reserve title to the property purchased.

Your orator further says that thereafter, and after the making of the agreement between your orator and said Brewing Company for the furnishing of said tanks, fixtures and fittings, and containing said reservation of title, said Brewing Company executed another deed of trust, bearing date the 24th day of September, 1908, but not acknowledged until the 6th day of January, 1909, after your orator had recorded its said agreement reserving title in the office of the County Clerk as aforesaid, in and by which said deed of trust said Brewing Company purported to convey to the defendant, Charles Claus, as trustee, the tract or parcel of land aforesaid, together with the buildings and structures then located thereon, or which might thereafter, be erected and built thereon, and all machinery, both fixed and movable, fixtures, appliances, implements and appurtenances of every description, which were then owned or might be thereafter acquired by said Brewing Company, and used or provided for use in the operation of its plant for carrying on its business, including engines, boilers, ice and refrigerating machines or plants, tanks, casks, and cooperage, brewing kettles, utensils bottling house machinery of every description, and all wagons and horses owned by said Brewing Company and used in carrying on its business, in trust to secure to the defendant, Carl Benz, the payment of a promissory note for the principal sum of four thousand four hundred (\$4,400.00) dollars, executed by said Brewing Company to said Benz, which said deed of trust thereafter, on the 29th day of January, 1909, was recorded in the office of the Clerk of the County Court of said County of Tyler, in Trust Deed Book No. 13, page 361, and a certified copy of which is ready to be produced in court here, when and as this Court shall direct; that said deed of trust remains unreleased of record in the office aforesaid, and your orator is informed and believes and on information and belief charges the fact to be that said promissory note secured by said deed of trust, and every part thereof, is and remains unpaid.

Your orator further says that on or about the 23rd day of December, 1907, the defendant, J. Hanford McCoy, in his own right, recovered a judgment against said Brewing Company for the sum of two hundred and sixty-two and 50/100 (\$262.50) dollars, with interest and costs, an abstract of which was thereafter, on the 4th day of January, 1908, recorded in the office of the Clerk of the County Court of said County of Tyler, in Judgment Lien Docket Number 2, page 111; that said judgment remains unreleased of record in the office aforesaid, but whether or what part, if any, of said judgment has been paid or satisfied, is to your orator unknown.

Your orator further says that on or about the 26th day of February, 1909, and at a term of the Circuit Court of said County of Tyler which commenced on the fourth Tuesday in February, 1909, and after the recordation of said agreement between your orator and said Brewing Company, reserving title as aforesaid, the defendants, Henry Feuchtwangner, Joseph Feucht-

wanger and Aaron Feuchtwanger, partners under the firm name and style of Feuchtwanger Brothers, recovered a judgment against said Brewing Company for the sum of three thousand four hundred and ninety and 72/100 (\$3,490.72) dollars, with interest thereon from the 16th day of October, 1908, and the costs of suit, an abstract of which judgment thereafter, on the 9th day of March, 1909, was recorded in the office of the Clerk of the County Court of said County of Tyler, in Judgment Lien Docket No. 2, page 131; that said judgment remains in full force and effect, unreversed, and not in any manner or part impeached, vacated, paid or satisfied.

Your orator further says that thereafter, on the 9th day of April, 1909, and after the recordation of said agreement between your orator and said Brewing Company, reserving said title, and after the execution and recordation of all of the deeds of trust aforesaid, and after the rendition of said judgments, and the recordation of said abstracts thereof, the defendants, George W. Hartman, and Bollinger Brothers, then having actual notice of your orator's said reservation of title, and the recordation thereof, and actual notice of said Brewing Company's indebtedness to your orator for said tanks, fixtures and fittings and then also having actual notice of the execution and recordation of said two last mentioned deeds of trust, and of the rendition of said judgments, filed their bill in the Circuit Court of the United States for the Northern District of West Virginia against the said defendants, said Brewing Company, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, by the name of D. J. O'Neil, Clem Polen, H. B. Shriver ex-sheriff of Tyler County, West Virginia, the City of Sistersville, and William E. Cummins, by the name of W. E. Cummins, collector and treasurer of said City of Sistersville, in and by which Bill said Hartman and said Bollinger Brothers alleged, in substance, among other things, that said Hartman and Bollinger Brothers, respectively, were the holders and owners of certain of the bonds secured by said deed of trust executed to said John S. Sell, as trustee, that said Sell, trustee, had failed and refused, and still failed and refused, to act as trustee under said deed of trust, although requested in writing so to do, that no other trustee had been appointed in the place and stead of said Sell, that said Brewing Company had made default in its obligations under said deed of trust and was probably insolvent, that said Brewing Company had made default in the payment of taxes on its said property, levied thereon by the City of Sistersville, Lincoln District, Tyler County, and the State of West Virginia, that said Justus, Skaggs, Hogenmiller, Beaver and Osman had obtained judgments against

11 said Brewing Company, rendered on the 20th day of January, 1909, by a Justice of the Peace of said County of Tyler, which judgments were liens on the property of said Brewing Company junior to said last mentioned deed of trust, that the defendants, D. J. O'Neil, and Clem Polen, being constables of said County, had levied executions under said judgments upon property subject to said deed of trust, that said defendant, W. E. Cummins,

collector of said City of Sistersville, had levied on property of said Brewing Company subject to said deed of trust, by virtue of unpaid tax bills for taxes due to said State, County and District, and that a receiver ought to be appointed of and for the property of said Brewing Company; and in and by which bill said Hartman and Bollinger Brothers, after alleging as aforesaid prayed that said O'Neil and Polen, constables, said Cummins, collector, and said defendant, H. B. Shriver, ex-sheriff of Tyler County, be restrained from selling or offering for sale any of the property levied upon by them and claimed to belong to said Brewing Company and then advertised for sale, that said deed of trust executed to said Sell, as trustee, might be foreclosed and the liens of all parties holding liens upon said property of said Brewing Company might be ascertained and said property sold for the purpose of paying off and discharging the liens upon the same and that the principal and interest accrued upon said bonds might be provided for in any decree of this Court that might be entered therein, and that a receiver might be appointed to take charge of said Brewing Company's property and to take care of the same and preserve it pending this suit, and that said complainants might have such other relief, both general and special as the necessities of their case might require and as to equity seemed meet and proper; a copy of which said bill is hereto annexed, made part hereof and marked "Exhibit B."

Your orator further says, that, although, as by said bill of said Hartman and Bollinger Brothers appears, said deed of trust executed on or about the 1st day of December, 1906, was executed and delivered to said John S. Sell, as trustee, and although no other trustee has been appointed in the place and stead of said Sell, and said Sell still remains and is the trustee in and of said Deed of Trust, yet said Sell, either as trustee or otherwise, was not joined as a party to said bill, and has not at any time been, nor is he now, a party to said suit of said Hartman and Bollinger Brothers; that said Sell was before and at the time of the commencement of said suit of said Hartman and Bollinger Brothers, and at all times since has been, and still is, a resident and citizen of the State of Pennsylvania, residing as hereinbefore alleged, and a resident and citizen of

12 the same State as were the said Hartman and Bollinger Brothers.

Your orator further says that, as by said bill of said Hartman and Bollinger Brothers appears, said Abijah Hays, either as trustee or otherwise, said W. H. Kirk, said J. Hanford McCoy, said Charles Claus, as trustee or otherwise, said Carl Benz, said Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger were not, nor was any of them, joined as parties to said bill, and they have not, nor has any of them, at any time been nor are they, or any of them, now parties to said suit; and that said Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, before and at the time of the commencement of said suit, and at all times since have been and still are, residents and citizens of the State of Pennsylvania.

Your orator further says that, as by said bill of said Hartman and Bollinger Brothers appears, your orator was not joined as a party to said bill, and your orator never has been joined or otherwise made, nor is it now, a party to said suit of said Hartman and Bollinger Brothers, nor did it have notice or knowledge of, nor did it consent or assent to or in any manner acquiesce in or ratify, confirm or approve the filing of the same.

Your orator further says that said Hartman, said Bollinger Brothers, and said Brewing Company, had actual notice and knowledge before and at the time of the filing of said bill of said Hartman and Bollinger Brothers, of your orator's said reservation of title and of your orator's recordation of said agreement containing said reservation of title, and that said Brewing Company's indebtedness to your orator for said tanks, fixtures and fittings was due and unpaid, and had actual knowledge and notice of the execution of said respective deeds of trust to said Hays, as trustee, and to said Claus, as trustee, and of the recordation thereof, and had actual notice and knowledge of the rendition of said respective judgments in favor of said J. Hanford McCoy and said Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, and of the recordation of the abstracts thereof, as aforesaid, and that said promissory note secured by said last mentioned deeds of trust, and said last mentioned judgment, were and remained unpaid as aforesaid, and had actual knowledge of the respective residences and citizenships of said John S. Sell, as trustee, Abijah Hays, as trustee, W. H. Kirk, Charles Claus as trustee, Carl Benz, J. Hanford McCoy, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, and your orator; and your orator is informed and believes, and on information and belief charges the fact to be, that, fraudulently and with the intent and purpose to confer on this Court a colorable jurisdiction of said suit, of which this honorable court otherwise would not have had jurisdiction, and with the intent and purpose to bring said tanks, fixtures and fittings to sale, under the decree of this honorable Court, and deprive your orator of its title and ownership of, in and to said tanks, fixtures and fittings, said Hartman, Bollinger Brothers and said Brewing Company combined and colluded together, to omit as parties to said suit, said John S. Sell, as trustee, Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, and Aaron Feuchtwanger, all residents and citizens of the State of Pennsylvania, and your orator, and that in pursuance and furtherance of said combination and collusion, said Hartman and Bollinger Brothers, fraudulently and with like intent and purpose did fail and omit to join as parties to said suit said John S. Sell, as trustee, Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, and your orator.

Your orator further says that the non-joinder of your orator and said Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, J. Hanford McCoy, Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, as parties to said suit, their interests in the said suit and the subject matter thereof, their indis-

pensable character as parties, and their respective residences and citizenships, do not appear of record in said suit, and your orator charges that said non-joinder of said indispensable parties, their interests in said suit and the subject matter thereof and their respective residences and citizenships were not disclosed to, or known by this Honorable Court, before or at the time of the entry of the order appointing a receiver and the decree of sale and reference in said suit hereinafter mentioned; and your orator is informed and believes, and on information and belief charges the fact to be, that said Hartman, Bollinger Brothers and Brewing Company, fraudulently, and with like intent and purpose, combined and colluded to, and did, conceal from this honorable court the non-joinder of said indispensable parties, their interests in said suit and the subject matter thereof, and their respective residences and citizenship.

Your orator further says that thereafter, on the 17th day of April, 1909, upon the petition of said Hartman and Bollinger Brothers, Complainants, it was by this Honorable Court ordered in said suit in equity, that the defendant, J. Hanford McCoy, by the name of J. H. McCoy, be and he was thereby appointed receiver of the plant and property covered by said deed of trust executed to said Sell, as trustee, including all the personal property both real and personal, in the City of Sistersville, belonging to the said Brewing Company, together with all of the manufactured stock on hand, which said receiver should immediately upon qualification take charge of and preserve from waste and deterioration.

Your orator further says that thereupon, on or about the 17th day April, 1909, said McCoy duly qualified as such receiver, and entered upon and took possession and custody of all of the property of said Brewing Company, including said tanks, fixtures and fittings constructed, furnished and erected by your orator, and that at all times since McCoy has been, and he still is, acting as such receiver and in possession and custody of said property, including said tanks, fixtures and fittings.

Your orator further says that it did not consent or assent to or in any manner acquiesce in, ratify, confirm or approve the appointment of said receiver, and that said proceedings were had, and said order entered without the knowledge, ratification, consent or acquiescence of your said orator.

Your orator further says that thereafter, on or about the 30th day of October, 1909, notwithstanding the non-joinder as parties to said suit, of your orator, and the residue of the persons hereinbefore mentioned, and notwithstanding the fact that the joinder as parties of your orator and said omitted persons would manifestly oust the jurisdiction of this court, as a Circuit Court of the United States, said Hartman, said Bollinger Brothers and said Brewing Company, fraudulently, and with like intent and purpose as aforesaid, combined and colluded together to procure the entry by this Honorable Court of the decree of sale and reference hereinafter mentioned, and procured as your orator is informed and believes, and so charges, the residue of the parties to said suit of said Hartman and Bollinger

Brothers, as well as said County Court of Tyler County, to consent to the entry of said decree; that your orator says that in pursuance of and by means of said combination and collusion, said Hartman, said Bollinger Brothers, and said Brewing Company procured this Honorable Court to enter, and this Court, without knowledge of the non-joinder, interest, residence and citizenship of said omitted parties, did enter, on the 30th day of October, 1909, in said suit of said Hartman and Bollinger Brothers, a decree, in and by which it was adjudged, ordered and decreed that said McCoy, as such receiver, do sell at public auction at the front door of the Brewery of said Brewing Company, all of the property of the said Brewing Company, situate in said City of Sistersville, consisting of said tract or parcel of land, together with the buildings of all kinds and structures thereon erected, and all machinery, fixed and movable, fixtures,

15 appliances, implements and appurtenances of every description, including engines, boilers, ice and refrigerating machines and plants, tanks, casks, cooperage, brewing kettles and utensils, bottling house machinery and all wagons and vehicles, office furniture, and in fine all of the property of said Brewing Company; and in and by said decree, said cause was referred to George E. Boyd, Master Commissioner, to report the amount of the bonded and mortgage indebtedness of said Brewing Company, its principal and interest, and the parties to whom due, and the amounts due them respectively, all the stockholders of said Brewing Company and the amount of stock owned by each stockholder, all other indebtedness of said Brewing Company, whether by lien or otherwise, and the persons and amounts, and any other matter required by any party and deemed pertinent by said Master; a copy of which said decree is hereto annexed, made part hereof and marked "Exhibit C."

Your orator further says that, although said decree of the 30th day of October, 1909, contains a recital that the same was entered by consent of all the parties to this suit and all parties interested in the result thereof, as indicated by the signatures of counsel at the foot of said decree, your orator did not, either itself or by counsel, or in any other manner, consent to said decree or the entry thereof; that none of the counsel approving, signing, or consenting to the entry of said decree, was the counsel of your orator or authorized to appear or consent to said decree or the entry thereof, for or on behalf of your orator, nor did any of said counsel purport or pretend to appear or consent for or on behalf of your said orator and that said decree was entered without the knowledge, consent or acquiescence of your said orator.

Your orator further says that, as to your orator and the residue of said omitted parties, said order appointing said receiver, and said decree of the 30th day of October, 1909, were entered wholly without jurisdiction, and were and are illegal and void.

Your orator further says that, under color of the authority conferred on him by said decree, said McCoy, as such receiver, published notice that on Saturday, the 11th day of December, 1909, at two o'clock in the afternoon, he would offer for sale at public auction, at

the front door of said Brewing Company's plant in said City of Sistersville, to the highest and best bidder therefor for cash in hand on day of sale, said tract or parcel of land, together with the brewery building, stable and wagon shed, office, bottling house, steam boilers, engines, ice plant, dynamos, tanks, hops, rice and other stock, cooperage, bottles, boxes, wagons, harness, ice plant, and all other property of any and every kind owned by said Sistersville Brewing Company in said City of Sistersville, a copy of which notice is hereto annexed, made part hereof, and marked "Exhibit D";

16 that, on the 11th day of December, 1909, said receiver adjourned said sale until the 18th day of December, 1909, that a further adjournment has been made until the 27th day of December, 1909; that your orator has informed and notified said receiver of your orator's title and ownership of, in and to said tanks, fixtures, and fittings, but, nevertheless, under color of said decree, said McCoy, as receiver, intends to and will, unless he shall be enjoined and restrained from so doing by the injunction order of this Honorable Court, sell, as the property of said Brewing Company, the said tanks, fixtures and fittings, constructed, furnished and erected in said brewery by your orator, and situate, and being in said brewery, as aforesaid.

Your orator further says that the said George E. Boyd, Jr., Master Commissioner, has not yet executed the decree of reference but that said Hartman and Bollinger Brothers, and the residue of the parties to their said suit, will bring on and prosecute said reference before said Master Commissioner, and procure said Master Commissioner to execute said reference, to the manifest prejudice of your orator, and contrary to equity and good conscience, unless they shall be enjoined and restrained from so doing, by the injunction order of this honorable Court.

Your orator further says that said tanks, fixtures and fittings, or any of them, are in no manner, way or means, connected up, attached to or joined to said brewery, the walls thereof or to any part or portion thereof by means of screws, bolts, pipes, fittings or any other mode or method of physical attachment or connection whatsoever and that said tanks, fixtures and fittings are situated in the chip tank room of said brewery and that said tanks rest or set on the floor of said chip tank room and are held in their place thereon by their own weight, resting on legs or supports which permit the height of said tanks to be raised or lowered by the adjustment of set screws set in said legs or supports; that said tanks are used for the purpose of storing the beer therein after the same has been brewed and manufactured, for the purpose of coloring the same and that the said beer is run into said tanks by means of a hose or syphon and is drawn off or out of said tanks by means of faucets or spigots set therein, and that said tanks are not connected up to or with any other part of said brewery, by fittings, connections or pipes of any kind or sort whatsoever.

Your orator further says that in order to remove said tanks, fixtures and fittings from said brewery and premises it will not be necessary to knock down or take apart said tanks, fixtures and fittings

and that said tanks, fixtures and fittings can be removed from said brewery and premises without injury, deterioration or damage to said tanks, fixtures and fittings and without damage or injury or diminution in value to said brewery building and premises, or any part thereof, but that possibly, owing to the size of said tanks, it may become necessary in removing them from the brewery building to enlarge a door or window in said building to make an opening of sufficient size to admit of the passage of said tanks through the same, and your orator says that if such should be the case such enlargement of a door or window can be made or done and such enlargement or opening closed up, repaired and put back in the same condition as before by competent and experienced workmen at a cost of not to exceed fifty dollars, and your orator says that if such enlargement of a door or window or opening should be necessary to enable your orator to remove said tanks, fixtures and fittings from said brewery that the same can be made or done without causing any damage or injury to the said brewery, buildings or premises or any part thereof, and without any damage or injury to and without impairing or causing any diminution in the value of the said brewery, building or premises or any part of the same as they would have stood had said tanks, fixtures and fittings not been constructed, furnished and erected by your orator therein and thereon, and your orator hereby offering and desiring to do equity in the premises hereby offers to pay the cost and expense of making such enlargement of a door or window or opening as may be necessary to remove said tanks, fixtures and fittings, from said brewery building, and also the cost of replacing, relaying and repairing said enlargement or opening and putting the same in as good condition as the same was prior thereto.

Your orator further says that, although tanks, fixtures and fittings like or similar to the tanks, fixtures and fittings, so constructed, furnished and erected by your orator, or other tanks, fixtures and fittings performing or designed to perform the same or equivalent functions may be convenient to the complete operation of said brewery, yet said tanks, fixtures and fittings so constructed, furnished and erected by your orator in said brewery can be removed from said brewery without injuring or impairing the value of the real estate, buildings or any part of said brewery and that the removal of said tanks, fixtures and fittings will not cause or occasion any diminution in the value of the brewery, real estate or buildings, or any part thereof, as they would have stood had said tanks, fixtures and fittings not been constructed, furnished and erected by your orator therein and thereon, though said brewery necessarily will be diminished in value as it now stands to an amount equal to the value of said tanks, fixtures and fittings so removed.

Your orator further says that the title to and ownership of said tanks, fixtures and fittings at all times have been and still are vested in your orator, superior to and free from said deeds of trust, and from the liens of said judgments, or any execution or executions on or under said judgments, or any of them,

and that your orator has the right, at its option, to take possession of and remove said tanks, fixtures and fittings.

Your orator further says that the said tanks, fixtures and fittings which are in controversy in this case and which were supplied by your orator to the said Brewing Company by and under the terms of said contract hereinbefore mentioned and set out, were at the time the same were erected, constructed and furnished to said Brewing Company by your orator, and now are, worth and are of the value of five thousand four hundred and eighty (\$5,480.00) dollars, exclusive of interest and costs.

Your orator further says that said Brewing Company is insolvent, and, except, as your orator's title to and ownership of said tanks, fixtures and fittings, your orator is without security for the aforesaid indebtedness of said Brewing Company to your orator.

Your orator further says that the defendant, the County Court of Tyler County, West Virginia, though not a party to said suit of said Hartman and Bollinger Brothers, consented to the entry of said decree on the 30th day of October, 1909, and your orator is informed and believes, and on information and belief charges the fact to be, that said County Court of said Tyler County claims a lien on the property of said Brewing Company for taxes, the nature and amount of which is to your orator unknown.

Your orator further says that the defendants, Justus, Skaggs, Hogenmiller, Beaver and Osman claim liens on the property of said Brewing Company, by virtue of judgments recovered by them against said Brewing Company, on the 20th day of January, 1909, and by virtue of executions under said Judgments, levied on property of said Brewing Company by the defendants O'Neil and Polen, constables, but which liens are inferior to your orator's title to and ownership of said tanks, fixtures and fittings; that the defendants, City of Sistersville, likewise claims a lien on the property of said Brewing Company for taxes, the nature and amount of which is to your orator unknown; and that the defendants, H. B. Shriver, as ex-sheriff of Tyler County, West Virginia, and William E. Cummins, collector and Treasurer of said City of Sistersville, did, prior to the filing of said bill of said Hartman and Bollinger Brothers, make levies on the property of said Brewing Company, for taxes claimed to be due from said Brewing Company.

Your orator further says that, by order entered in said suit of Hartman and Bollinger Brothers, this honorable court
19 granted leave unto your orator to join said McCoy, as receiver, as a party defendant to this bill, praying such relief against said receiver as your orator might be advised.

For as much, therefore, as your orator is without remedy at and by the strict rules of the common law, and is only relieviable in a court of equity, where such matters are properly cognizable and relieviable, and to the end therefore, that said Sistersville Brewing Company, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County of Tyler, in the State of West Virginia, City of Sistersville, W. E. Cummins, as collector and treasurer of said City of

Sistersville, John S. Sell, as trustee, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company, Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners under the firm name and style of Feuchtwanger Brothers, George W. Hartman, Bollinger Brothers, otherwise called Bollinger Bros., and the County Court of Tyler County, West Virginia, may respectively full, true, direct and perfect answers make, according to the best of their respective knowledge, information and belief, to all and singular the matters and charges aforesaid, but not under oath, the answer under oath being hereby expressly waived, as fully and particularly in every respect as if the same were here again repeated and they thereunto particularly interrogated; that the title to and ownership of said tanks, fixtures and fittings may be decreed to be vested in your orator, superior to and free from said deeds of trust and the liens of said judgments and of any execution or executions on or under said judgments, or any of them, and superior to and free from any other lien created or suffered by said Brewing Company; that, as to and against your orator, said order appointing said receiver, and said decree of the 30th day of October, 1909, entered in said suit of said Hartman and Bollinger Brothers may be decreed to be without jurisdiction and null and void; that said J. Hanford McCoy, in his own right, and as receiver of said Brewing Company, may be enjoined and restrained from selling or offering or attempting to sell, under color of said decree of the 30th day of October, 1909, or otherwise, the property in said decree, or in said notice of sale mentioned, and particularly said tanks, fixtures and fittings of your orator, or any of them, and from retaining, or attempting to retain possession or custody of and from exercising, or attempting to exercise any dominion or control over, said tanks, fixtures and fittings, or any of them; that said George W. Hartman, Bollinger Brothers, Sistersville Brewing Company, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff as aforesaid, City of Sistersville, William E. Cummins, as collector and treasurer as aforesaid, and said J. Hanford McCoy, as receiver as aforesaid, and their and each of their agents, attorneys and counsel, may be enjoined and restrained from bringing on or prosecuting said reference to said George E. Boyd, Master Commissioner; and that your orator may have such other and further relief as the nature of its case shall require, and as shall be agreeable to equity.

May it please your Honors to grant unto your orator a provisional or preliminary writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to said J. Hanford McCoy in his own right, and as receiver of said Brewing Company, enjoining and restraining him from selling or offering or attempting to sell, under color of said decree of the 30th day of October, 1909, or otherwise, the property in said decree, or in said notice of sale mentioned and particularly said tanks, fixtures and fittings of your orator, or any of them, and from retaining or attempting to retain

possession or custody of and from exercising or attempting to exercise any dominion or control over, said tanks, fixtures and fittings, or any of them, and to be directed to said George W. Hartman, Bollinger Brothers, Sistersville Brewing Company, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff as aforesaid, City of Sistersville, William E. Cummins, as collector and treasurer of said City of Sistersville, said County Court of Tyler County, West Virginia, and said J. Hanford McCoy, as receiver as aforesaid, enjoining them, and each of them, and their and each of their agents, attorneys and counsel, from bringing on or prosecuting said reference to said George E. Boyd, Jr., Master Commissioner, and that upon the final hearing of this cause said provisional or preliminary injunction may be made perpetual.

May it please your Honors to grant unto your orator the writ of subpoena of the United States of America, to be directed to said Sistersville Brewing Company, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County of Tyler, in the State of West Virginia, City of Sistersville, William E. Cummins, as collector and treasurer of said City of Sistersville, John S. Sell, as trustee, J. Hanford McCoy, in his own right, and as receiver of said Sistersville Brewing Company, Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, George W. Hartman, Bollinger Brothers, otherwise called Bollinger Bros., and the County Court of Tyler County, West Virginia, thereby commanding
 21 them and every of them at a certain day, and under a certain pain therein to be specified, personally to appear before your honors in this honorable court, and then and there to answer all and singular the premises, and further to stand to abide and perform such order and decree therein as to your honors shall seem agreeable to equity and good conscience. And your orator shall ever pray, etc.

DETROIT STEEL COOPERAGE CO.,

Complainant, by Counsel.

CHAS. N. KIMBALL,

GEO. M. HOFFHEIMER,

Counsel for Complainant.

UNITED STATES OF AMERICA,

State of Michigan, County of Wayne. To wit:

W. L. Fisk, being first duly sworn according to law, on his oath deposes and says, that he is Secretary of Detroit Steel Cooperage Company, a corporation, the complainant named in the above and foregoing bill; that he has read said bill and that he knows the contents thereof, and that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and as to such allegations he believes them to be true, and except as to the statement in said Bill contained, that leave was granted by the Circuit Court of the United States for the Northern

District of West Virginia, to join the defendant J. Hanford McCoy, as receiver, as a party to said bill, said leave not having yet been obtained at the time this affidavit is made.

W. L. FISK.

Taken, subscribed and sworn to before me, in the County of Wayne, in the State of Michigan, on the 14th day of December, A. D. 1909.

[SEAL.]

ARTHUR D. SANDELL,
*Notary Public in and for the County
of Wayne and State of Michigan.*

My commission expires on Feb. 4, 1911.

UNITED STATES OF AMERICA,
*Northern District of West Virginia,
County of Barbour, To wit:*

George M. Hoffheimer, being duly sworn, on his oath says that he is of counsel for Detroit Steel Cooperage Company, the complainant named in the foregoing bill; that he has read said bill and knows the contents thereof, and that the statement therein contained that leave was granted by the Circuit Court of the United States for the Northern District of West Virginia to join the defendant J. Hanford McCoy, as receiver of Sistersville Brewing Company, as a party to said Bill, is true.

GEO. M. HOFFHEIMER.

Taken, sworn to and subscribed before me in the County of Barbour in the State of West Virginia, on this 22 day of December, A. D. 1909.

URIEL MCCOY,
*Notary Public in and for the
County of Barbour in the State of W. Va.*

My commission expires on Dec'r 31, 1909.

Certificate of Official Character of Magistrate.

(Official Signature of Magistrate.)

ARTHUR D. STANSELL.

(Post office address) 14 Butler Bldg., Detroit, Michigan.

STATE OF MICHIGAN,
County of Wayne, ss:

I, Thos. F. Farrell, Clerk of the Circuit Court of the County and State aforesaid, do hereby certify that Arthur D. Stansell is a Notary Public in and for said County and State and authorized to administer oaths for general purposes; that his term of office commenced on the fifth day of February, in the year 1907, and will expire on the fourth day of February, in the year 1911, and that his signature above written is genuine.

Given under my hand and the seal of said county, at Detroit Michigan, on this fourteenth day of December, in the year of our Lord, 1909.

[SEAL.]

THOS. F. FARRELL, *Clerk*,
By JOHN R. FISHER, *Dep'y Clerk*.

23

(EXHIBIT A.)

Proposal from The Detroit Steel Cooperage Co., Detroit, Mich.

Chip Cask. Specification.

To Sistersville Brewing Co., Sistersville, W. Va.

Date August 6, 1908.

Number and Description of Tanks.

Number of Chip Casks to be furnished 11.

Outside Diameter 8'0". Inside Diameter 7'6".

Number of rings in each Tank 3.

Height of each Ring 3'6".

Thickness of material in Rings 5/16".

Thickness of material in Bottoms 7/16".

Height over all from Floor to Top of Tank 12'10".

Capacity per Tank, in Barrels, at 31½ gals. per bbl. 125.

The Bottom and Head of each Tank will be dished about ten inches.

All Tanks will be lined inside with our special glass enamel and bolted together as shown on above cut with our Perfection Gasket between flanges.

Fittings and Fixtures.

Each Tank will be provided with the following Fixtures and Fittings:

8 Cast Iron Adjustable Floor Stands.

One inside swinging manhole Door in lower Ring, enameled on inside.

One 1½ inch Lever handle straightway cock in lower Ring near bottom.

One Try Cock in second Ring.

One 3-inch Connection in centre of head with cap tapped for bung cock.

One special double Bung Cock.

One 1½ inch Connection in centre of bottom with a 1½ inch copper tinned pipe to extend to outside of rim, which pipe will be provided with a 1½ inch brass straightaway cock.

24 One special brass strainer for above connection to go inside of Tank.

Painting.

Each Tank will receive one coat of the best quality of Anti-Rust paint before leaving our Works.

Testing.

Each Tank will be properly tested and guaranteed tight under a pressure of 15 lbs. and to withstand a cumulative bursting pressure of 50 lbs. to the square inch.

Remarks.

Chip Cask. Specification.

To Sistersville Brewing Co., Sistersville, W. Va.

Date August 6, 1908.

Number and Description of Tanks.

Number of Chip Casks to be furnished 2.

Outside Diameter 8'0". Inside Diameter 7.6".

Number of Rings in each Tank 2.

Height of each Ring 3'6".

Thickness of Material in Rings 5/16".

Thickness of material in Bottoms 7/16".

Height over all from Floor to Top of Tank 9'4".

Capacity per Tank, in Barrels, at 31½ gals. per bbl. 84.

The bottom and head of each tank will be dished about ten inches.

All Tanks will be lined inside with our special glass enamel and bolted together as shown on above cut as shown on our Perfection Gasket between flanges.

Fittings and Fixtures.

Each Tank will be provided with the following Fixtures Fittings.

7 Cast Iron Adjustable Floor Stands.

One inside swinging manhole Door in lower Ring, enameled on inside.

One 1½ inch Lever handle straightway cock in lower Ring near bottom.

One Try Cock in second Ring.

25 One 3 inch Connection in center of head with Cap tapped for bung cock.

One special double Bung Cock.

One 1½ inch Connection in Centre of bottom with a 1½ inch copper tinned pipe to extend to outside of rim, which pipe will be provided with a 1½ inch brass straightway cock.

One special Brass Strainer for above connection to go inside of Tank.

Painting.

Each Tank will receive one coat of the best quality of Anti-rust Paint before leaving our Works.

Testing.

Each Tank will be properly tested and guaranteed tight under a pressure of 15 lbs. and to withstand an accumulative bursting pressure of 50 lbs. to the square inch.

Remarks.

* * * * *

Material.

All material used in the construction of these tanks and fittings will be the best of its respective kind and will be free from sand-holes and all other defects. All plates to be of open hearth flange steel of best known quality and rolled specially for our purpose.

Flanges and Joints.

All rings will be neatly flanged about three inches and made in sizes as hereinbefore specified, and all flanges will be closely drawn together by special washer head bolts $\frac{5}{8}$ " diameter and about $1\frac{3}{4}$ " centres.

Between all flanges will be laid our "Special Patented" Perfection gasket so as to make a perfect tight joint and a metal finish on the inside of the tank, making it an entirely metal tank, easily kept clean and without any wear and tear on same.

Enameling.

After the interior surface of all rings and heads has been thoroughly sandblasted so as to remove every particle of scale and dirt, it will be thoroughly coated with our own special prepared glass enamel and burned into the steel under a heat of about 1,780 degrees Fahrenheit, at which temperature the pores of the steel are thoroughly open and the enamel is incorporated into the very fibre of it and will last during the life of the tank. For this purpose we use a special designed furnace, which is muffled and so constructed that no live flames come in contact with the enamel and liable to damage same before it becomes amalgamated with the steel.

Conditions.

It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified and any notes and acceptances that may be given on account of any such payments,

shall have been fully paid; and in case of default in any of said payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures.

Delivery.

We agree to furnish all of the 13 tanks, together with all fixtures and fittings as herein specified, F. O. B. cars at Sistersville, W. Va., on or before the — day of —, 190—, provided we are not delayed by accidents, strikes, riots, delays of carriers or other causes beyond our control.

Erection.

We will furnish the necessary labor and tools to erect in your brewery all of the herein specified tanks and connect the fittings and fixtures thereto in a first class and complete manner; also to test all of the tanks and make them perfectly tight under such pressure as before specified, but you are to furnish the necessary *or* air for testing said tanks whenever it may be needed by our erecting Engineer.

Openings.

You are to provide all necessary openings in walls and buildings, to readily admit the tanks, finished and completed at our factory, so that they may be installed in their respective places and positions without being taken apart.

Price.

27 The price of all the 13 tanks, together with the fixtures and fittings thereto, delivered and erected as hereinbefore specified, is the sum of five thousand four hundred eighty dollars, \$5,480.00.

Terms.

The payments of the above purchase price to be made as follows: \$2,000.00 when all of the tanks have been shipped. \$740.00 when erected at Brewery and tested. \$2,740.00 in the form of a promissory note, payable in three months from date with 6% interest per annum.

DETROIT STEEL COOPERAGE
COMPANY,

By H. C. WIEDMAN, *Gen'l M'gr.*

Accepted Aug. 8, 1908.

We hereby accept the above proposition together with the conditions and terms as therein stated.

SISTERSVILLE BREWING CO.,
By W. H. KIRK, *Sec'y.*

(Endorsements.)

Presented in the Clerk's office of the County Court of Tyler County, West Virginia, on the 7th day of December, 1908, and admitted to record.

Attest:

J. W. DUTY, *Clerk*.

#1059. Proposal from Detroit Steel Cooperage Co., Detroit, Mich., to Sistersville Brewing Co., Sistersville, W. Va.

Clerk's Office County Court, Tyler County, West Virginia, ss:

Received for record 7th day of Dec., 1908, at 6 P. M. and recorded in D. of T. Book No. 13, page 341, \$1.50 for Bill #7117.

J. W. DUTY, *Clerk*.

Ent'd.

Date of Proposal, Aug. 6, 1908.

Date of acceptance, ———, 190—

To be completed ———, 190—

Presented for Record by Chas. N. Kimball, Att'y, with instructions to return or deliver the same when recorded, etc., to him. Sistersville, W. Va.

28

EXHIBIT B.

To the Honorable the Circuit Court of the United States for the Northern District of West Virginia:

The bill of complaint of George W. Hartman, a citizen of Pennsylvania, Bollinger Bros., a corporation and citizen of Pennsylvania, exhibited in said court against the Sistersville Brewing Company, a corporation of W. Va., Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, D. J. O'Neil, Clem Polen, citizens of West Virginia, H. B. Shriver, ex-sheriff of Tyler County, W. Va., and the City of Sistersville, a corporation of W. Va., and W. E. Cummins, collector and treasurer of Sistersville, W. Va., defendants. Humbly complaining therefore unto your Honor your orators George W. Hartman and Bollinger Bros., a corporation, that heretofore, to-wit: on the — day of December, 1906, the Sistersville Brewing Co., a corporation, organized and doing business under the laws of the State of W. Va., in the City of Sistersville, made and executed and delivered unto John S. Sell, a trustee, a certain mortgage or deed of trust, $\frac{1}{4}$ copy of which said mortgage duly certified is exhibited herewith as Exhibit "A" of this bill of complaint and prayed to be taken and held as part of the same, which said mortgage was on the — day of —, duly admitted to record in the clerk's office of the County Court of Tyler County by which it will appear that the said Sistersville Brewing Co., a corporation, being thereto duly authorized by its constituted authorities made, executed and delivered unto said John

S. Sells, trustee, the aforesaid mortgage whereby in consideration of the premises recited therein and in consideration of the sum of one dollar said Brewing Co. granted, sold, conveyed and set over unto said trustee, his successor or assigns a certain tract or parcel of land lying, being and situate in the City of Sistersville, W. Va., as will more fully appear by reference to said mortgage or trust, together with the Brewery building, machinery, and appliances thereon at that time erected or to be thereafter erected; that all the appurtenances thereto belonging or in anywise appertaining thereto, together with all the corporate rights and privileges of said brewing company.

Your orators further represent that the said Sistersville Brewing Co. at and previous to the date of execution of said trust had authorized the issue of a series of bonds aggregating eighty in the total for the sum of \$500.00 each and of the denomination of \$500.00 each, numbered consecutively from one to eighty, inclusive, said bonds bearing date the first day of December, 1906, bearing interest at the rate of six per cent. per annum and payable semi-annually on the first day of December and the first day of June, each year, principal and interest to be paid in gold coin of the United States of the present standard of weight and fineness, said interest to be paid as aforesaid with coupons attached to each bond therefor.

Your orators further represent that of the aforesaid recited bonds ten thereof will mature and become payable on the first day of December, 1909, which said bonds are owned and held by the complainant, G. W. Hartman, and the remainder of said issue of \$35,000.00 will mature annually thereafter in the same ratio as will appear in Exhibit "A" hereinbefore referred to. Your orators further represent that the aforesaid mortgage or trust was given for the purpose of securing the said issue of \$40,000.00 worth of bonds hereinbefore recited, there being eighty of said bonds of the denomination of \$500.00 each, and the same are now owned and held as follows: Bollinger Brothers are the owners and holders of nineteen of the said bonds, G. W. Hartman owns thirty bonds, Albert H. Oyer six bonds, H. S. Bossart fifteen bonds, E. Arch Cohen eight bonds, and one bond is owned by some person unknown to your orators. Your orators further represent that default has been made in the payment of the interest upon all of the said bonds hereinbefore referred to and secured by said mortgage, and that there was due to the complainants, Bollinger Brothers, on their said nineteen bonds the sum of \$4,035.00 interest as of December 1, 1908, and that there was due to your orator G. W. Hartman on his said thirty bonds the sum of \$450.00 interest as of December 1, 1908. Your orators do not state at this present time the amount of interest due to each of the holders of the other bonds respectively held by them. Your orators further represent that it was provided by said mortgage and deed of trust that said trustee was to have and to hold said property thereby conveyed to it for the use, benefit and security of the owners and holders of the aforesaid bonds provided for in said mortgage and to secure the payment of the same together with all accrued interest thereon subject to the free and uncontrolled possession and manage-

ment of said premises therein conveyed until the said trustee should be authorized to enter upon the said premises to sell same as in the said trust specified, and for purpose of showing distinctly the terms and conditions and the definition of the obligations imposed upon said trustee it was further provided and declared in the said deed of trust as follows:

First. That the party of the first part, that is to say: Sistersville Brewing Company, corporation, should pay to the holders of the bonds provided for in said trust and intended to be secured by the same or any that might be issued in lieu thereof or in substitution of the same, respectively, the interest thereof semi-
30 annually as the same may become due and payable according to the terms of the bonds described in said deed and on the dates therein mentioned for the payment of the same as will also, upon the dates and times mentioned in said bonds respectively whereon the principal sum of said bonds shall according to the provisions thereof respectively become due and payable fully and entirely pay off and satisfy as aforesaid the whole of said bonds both principal and interest without further delay and it is further provided that said Sistersville Brewing Company should also pay any and all lawful taxes, charges, assessments, that should be laid, levied or assessed upon the said Brewing Company real estate and premises thereby mortgaged or upon the said corporation its property and franchises so as to save the estate thereby granted from perils of sale and forfeiture for non-payment of taxes, charges, or assessments and shall also further provide that said company should pay for such fire insurance policies for insurance on said brewery and other property covered by said mortgage on behalf of said trustee as the said trustee or its successors might from time to time demand not exceeding \$40,000 except by consent of first party and in case of destruction or damage by any peril covered by said insurance, the amount of said policy or policies when paid, if sufficient with other funds of said party of the first part to repair or rebuild the said brewery or other property so destroyed should be appropriated for that purpose; and if not sufficient therefor then the same should be used for the benefit or payment of the said bonds secured by said mortgage; and it was further provided that the Brewing Company will pay annually the taxes levied on said bonds by the State of West Virginia or any other authority until said bonds are paid or discharged.

Second. It was further provided that if said brewing company should after the date of said bonds at any time after demand made, default or refuse, neglect, or omit for any time exceeding three months to pay the semi-annual interest of said bonds secured by said mortgage or any part of them or should after demand make default, refuse, neglect or omit for any period exceeding three months to pay the principal sum of each and all of said bonds or any of them when as the same become due and payable or shall neglect, refuse or omit to pay any lawful taxes, charges or assessments that may be laid, levied or assessed upon said brewery, real estate and premises, mortgaged as aforesaid, or upon said corporation its property or franchises, so that the estate thereby granted

shall be in peril of sale or forfeiture for non-payment thereof or should neglect or refuse to pay for such insurance as the second party, to-wit, the said trustee, might in accordance with the terms thereof require, or should neglect or refuse to pay any taxes levied by any authority upon said bonds then and in every such case said second party, to-wit, the trustee, should upon the written request of the holder or holders of the majority of said bonds then outstanding enter upon and take possession of said brewery, real estate, premises and property mortgaged, and should manage, use and control said brewery to the best advantage, receive and take all stocks, amounts due and incomes thereof, and appropriate the net incomes and proceeds after deducting all payments of taxes, liens or charges as well and the expense of said trust and such sum or sums as *as* should be sufficient or proper to indemnify the trustee against any liability or loss or damage for or on account of any matter or thing done by the said trustee in good faith, in pursuance of its duties as trustee to the payment in full, without any preference, priority, or distinction to one bond over any other, first, to the interest due upon and (second) to the principal of all the said bonds then outstanding in full. If the said income be sufficient but if not then pro rata; and it is further provided that said trustee shall and will either after or upon entering after taking possession at the request of the holders of the majority of said bonds then outstanding proceed to sell brewery, real estate, premises and property mortgaged under said trust to the highest bidder at public auction in the city of Sistersville, after giving three months' notice of such intended sale by publication to be made once a week in at least one daily newspaper published in the City of Pittsburg, and one in the City of Sistersville and by not less than twenty hand bills posted in conspicuous places in the City of Sistersville.

Third. It was further provided that in the event of the resignation, neglect or refusal or incapacity to act as said trustee that said brewery company should have full power and authority to nominate and appoint a new trustee for the purpose of filling the vacancy caused by said neglect or failure and the said trustee or trustees so nominated and appointed, should take upon himself the same trusts and powers and be subject to the other stipulations and conditions as are declared in said trust and to perform all the duties required of the said trustee.

Your orators represent that there are numerous other stipulations and provisions in the said mortgage contained which are not necessary to be recited here at length but to which your orators refer your Honor for the information to a certified copy of said mortgage which are made a part of this bill of complaint should the same be deemed necessary by the court.

Your orators further represent that the said Sistersville Brewing Company, a corporation, the grantor in said mortgage or deed of trust has made default therein in the following particulars: First: the said corporation has not paid any interest upon its bond issue hereinbefore recited to any of the holders of said bonds; Second: That the said corporation is now in de-

fault of the interest due on said bond issue; Third: That said corporation is in default to your orator Bollinger Bros. as on the first day of December, 1908, in the sum of \$4.035 interest accrued; and the said corporation is in default to your orator George Hartman in the sum of \$450 accrued interest on the said thirty bonds owned and held by him.

Fourth. That said corporation is in default in its failure to pay the taxes, charges and assessments levied against its said property by the City of Sistersville, Lincoln District, Tyler County, and State of West Virginia, in the aggregate of the sum of about fifteen hundred dollars.

Fifth. That said corporation has made default in said mortgage by failing to secure the necessary insurance required of it according to the terms, covenants and stipulations of the aforesaid mortgage and your orators further represent that said default or interest has accrued and continued for more than three months after the date of the accrued interest became due and no part of the interest on said mortgage bonds nor of the taxes, levies and assessments hereinbefore recited have been paid by the said corporation or any one for it; nor has the insurance provided for in said mortgage ever at any time been secured by the said corporation or any one for it. And your orators further state that said corporation has wholly defaulted to keep the various material, covenants and agreements which it bound and obligated itself to keep and perform, and that its condition is such that your orators believe that it is not able to comply with the stipulations of said mortgage or is able to make payment in its present condition of the interest accrued on said bond issue, nor of the taxes, levies or assessments already accrued against it, or to pay insurance premiums on insurance as provided by said corporation mortgage to its said bondholders. Your orators further represent that on the 20th day of January, 1909, Gale Justus obtained before J. H. Marshall, justice of Lincoln District, a judgment for the sum of \$165.00 against said Sistersville Brewing Co. with interest and cost as will appear by a copy of said judgment exhibited herewith as exhibit "C" and prayed, &c.

Your orators further represent that on the 20th day of January, 1909, one R. H. Skaggs obtained a judgment before J. H. Marshall, justice, against the said Sistersville Brewing Co. for \$76.00 with interest and cost as will appear by a copy of said judgment exhibited herewith as exhibit "D" and prayed, &c.

33 That on the 20th day of January, 1909, F. Hogenmiller obtained a judgment before said justice against said Sistersville Brewing Co. for the sum of \$140.00 with interest and cost as will appear by a copy of the said judgment exhibited herewith as exhibit "E" and prayed, &c.

That on the 20th day of January, 1909, one G. M. Beaver obtained before the aforesaid justice a judgment against the said Sistersville Brewing Company for the sum of \$53.85 with interest and cost as will appear by a copy of the same marked as exhibit "F" and prayed, &c.

That on the 20th day of January, 1909, one A. Osman obtained a judgment against the said Sistersville Brewing Company before

said justice for the sum of \$200.00 with interest and cost as will appear by a copy thereof marked exhibit "G" and prayed, &c.

All of which said judgments as your orators believe are liens upon the real estate of the said Sistersville Brewing Co. but junior to said deed of trust hereinbefore recited which is a lien upon the property of said company as recited.

Your orators further represent that executions have been issued upon all of the aforesaid judgments exhibited and that the defendants D. J. O'Neil and Clem Polen have levied upon certain property of the said Brewing Company on the premises of the said company, being a part of the plant and property of the said company used in connection therewith, all of which was conveyed by said deed of trust and is subject to the said deed of trust, and as your orators allege are not liable to levy or attachment under any process of law; that the City Collector of taxes, W. E. Cummins, has levied upon certain articles the property of the said Sistersville Brewing Co. by virtue of unpaid tax bills for the State, County and District taxes for the year 1908; and that said D. J. O'Neil and Clem Polen, constables of Lincoln District, in said County of Tyler, and State of W. Va., and the said collector of taxes in the City of Sistersville and the said ex-sheriff after having made their respective levies, &c., have advertised various articles and pieces of property of the said Sistersville Brewing Company for sale at public auction and unless interfered with or restrained will doubtless proceed to offer the said property for sale in pursuance of their said levies and notices of sale.

Your orators allege that no part of the property levied upon by the said two constables, the City Collector, and ex-sheriff are liable to levy and sale by said executions and said tax bills because the said property is in fact and in effect a part of the real estate and plant of the said Sistersville Brewing Company.

That said ex-sheriff has also levied upon the motors in said brewery which are an essential part of the said plant and that a sale of the property so levied on will work destruction of said brewery plant and irreparably injure and damage the same and so far work a destruction of the manufactured beer as that the same will be a total loss.

Your orators further represent that there is in the said brewery about eleven hundred barrels of beer manufactured and ready for the market and of the value of about five thousand dollars; that it is necessary that said beer should be handled and put upon the market speedily, otherwise the same will deteriorate and become a total loss.

Your orators further represent that said Sistersville Brewing Company is heavily indebted as hereinbefore stated and recited and in its present condition is probably indebted to the point of insolvency and that it has made the defaults hereinbefore recited because of its inability to earn money with which to keep down the accruing interest and to conduct its *accruing interest and to conduct its business* and there is no probability that in its present condition that it would sell for more than enough to pay off and discharge its present bonded indebtedness, or if so, but little beyond its accrued indebtedness.

ness; and that they are of the opinion that a receiver should be appointed to take care of the said beer on hands and to sell it for the benefit of the said creditors.

Your orators further show that the said trustee, John S. Sells, has failed and refused and still fails and refuses to act as trustee under the mentioned mortgage although requested in writing so to do he, said Sells, being cashier of a bank, and cannot leave his business to act as such trustee and refuses to leave his business to act as trustee, and that if even if said Brewing Company had the authority under the law to appoint or nominate a trustee as mentioned in said trust, it has not done so but wholly failed and refused and still fails and refuses so to do.

In consideration of the premises and being without remedy at the common law your orators pray that the parties named in the caption of this bill of complaint as defendants may be made defendants of this bill of complaint and for process against them and each of them and in further consideration of the premises they pray that D. J. O'Neill and Clem Polen, constables, and W. E. Cummings, collector of taxes for the City of Sistersville and H. B. Shriver, ex-sheriff of Tyler County may be restrained from selling or offering for sale any of the property levied upon by them and claimed to belong to the Sistersville Brewing Company and now advertised for sale, until further order of your Honor's court; they further pray that the aforesaid mortgage or deed of trust may be foreclosed and the liens of all parties holding liens upon said property of said brewing company may be ascertained and the said property sold under
35 decree of the court for the purpose of paying off and discharging the liens upon the same and that the principal and interest accrued upon said bonds may be provided for in any decree of the court that may be entered herein; they also pray that a receiver may be appointed by your Honor to take charge of said Brewing Company's property and to care for the same and to preserve it pending this suit; and that — full authority and power to handle, and pack the said beer in said brewery and to put the same upon the market and to sell it for the benefit of the creditors mentioned herein. They also pray for such other relief both general and special as the necessities of their case may require and as to equity — seem *mete* and proper, and your orators will ever pray, &c.

GEORGE W. HARTMAN,
BOLLINGER BROS.,

A Corporation,

By COUNSEL.

ARLEN G. SWIGER,
THOS. P. JACOBS,

Counsel for Complainants.

STATE OF WEST VIRGINIA,

County of Tyler, To wit:

I, George W. Hartman, one of the plaintiffs being first duly sworn, says that the facts and allegations herein contained are true,

except where they are herein stated to be on information, and that where they are herein stated to be on information he believes them to be true.

GEO. W. HARTMAN.

Taken, sworn to and subscribed before me this seventh day of April, 1909.

J. H. McCOY,
Notary Public.

EXHIBIT C.

Decree of Sale and Reference. Oct. 30th, 1909.

In Equity.

GEORGE W. HARTMAN et al.

vs.

SISTERSVILLE BREWING COMPANY et al.

36 This cause came on this 30th day of October, 1909, to be heard upon the bill of complaint and exhibits therewith filed, process duly served and returned; upon the orders and decrees heretofore entered herein and on the bill of complaint taken for confessed, and was argued by counsel. On consideration whereof, and by consent of all the parties to this suit and all parties interested in the result thereof, as is indicated by the signatures of counsel at the foot of this decree, it is adjudged, ordered and decreed that J. H. McCoy, Esq., the receiver heretofore appointed herein, do sell at public auction at the front door of the Brewery of said Sistersville Brewing Co. in the City of Sistersville, W. Va., to the highest bidder and for cash, all the property of said Sistersville Brewing Company, situate in said City, consisting of a certain tract, lot and parcel of land in the Fourth Ward of said City, containing seven hundred and forty-one thousandths (.741) of an acre and more particularly described in the exhibits with said bill of complaint, being the same property conveyed to said corporation by Virginia E. C. Roome and E. Roome by deed dated July 25th, 1905; together with the buildings of all kinds and structures thereon erected; and all machinery, fixed and movable, fixtures, appliances, implements and appurtenances of every description, including engines, boilers, ice and refrigerating machines and plants, tanks, casks, cooperage, brewing kettles and utensils, bottling house machinery and all wagons and vehicles, office furnitures, and in fine all the property of the said corporation.

Before proceeding to sell said property, said receiver shall advertise notice of the time, terms and place of sale for five successive weeks in the Daily Oil Review, published in said City of Sistersville, W. Va., and also for the same period in the daily edition of the Gazette-Time-, a newspaper published in the City of Pittsburgh, Pa. Before the said receiver shall proceed to sell under this decree or to act thereunder, he shall execute an additional bond in the penalty of \$60,000.00 with security approved by the clerk of this court with

condition to perform faithfully and impartially all his duties in executing and carrying out the provisions of this decree and that he will promptly account for and pay over as required by law and any order of the court all moneys which may come to his hands hereunder. And he shall also publish with his notice of sale the certificate of the clerk that such bond has been executed and approved by him. And said receiver shall report his proceedings under this decree to a future term of court. And by like consent, it is further adjudged, ordered and decreed that this cause be referred and committed to Geo. E. Boyd, Jr., Master Commissioner, who shall report to the court the following matters and things, to-wit:

First, the amount of the bonded and mortgage indebtedness of the said Sistersville Brewing Company, its principal and interest and the parties to whom due and the amounts due them, respectively.

Second, all the stockholders of said corporation and the amount of stock owned by each stockholder.

Third, all other indebtedness of said corporation, whether by lien or otherwise, and the persons and amounts.

Fourth, any other matter required by any party and deemed pertinent by said master.

Said master before executing this order shall give notice thereof for a period of five weeks by publishing such notice in some newspaper published in the City of Wheeling, W. Va., once per week for five successive weeks, giving the time and place of his sitting to execute this order and by mailing such notices to each of counsel signing this decree; and for the purpose of executing this decree he shall sit in the City of Wheeling, W. Va. He shall report his proceedings hereunder, with any and all evidence taken by or before him and shall have power to take all evidence and to require the production of all books and papers deemed necessary to make his report complete.

We approve of and consent to the foregoing decree and request its entry by the court, this 22nd day of October, 1909.

ARLEN G. SWIGER,

THOS. P. JACOBS,

Counsel for the Complainants and

Counsel for All Bondholders.

A. G. SMITH,

Counsel for Sistersville Brewing

Co. & Stockholders.

K. C. MOORE,

Counsel for County Court of Tyler County.

W. E. CUMMINGS,

Collector & Treas. for the City

of Sistersville, W. Va.

ARLEN G. SWIGER,

THOS. P. JACOBS,

Counsel for All the Unsecured Creditors.

Enter: Oct. 30, 1909.

ALSTON G. DAYTON, *Judge.*

38

EXHIBIT D.

Receiver's Sale of a Fine Brewery.

By virtue of the authority vested in me by a decree entered on the 30th day of October, 1909, in the United States District Court of the Northern District of West Virginia in the chancery cause therein pending in which George W. Harman et als. are complainants and the Sistersville Brewing Company et als. are defendants, I will offer for sale at public auction at the front door of the said Sistersville Brewing Co., plant on Eells street, in the City of Sistersville, W. Va., to the highest and best bidder therefor for cash in hand on day of sale on Saturday the 11th day of December, 1909, at 2 o'clock p. m. on that day the following described property, to-wit: A tract or parcel of land containing 00.741 acres of land, being the same land conveyed by E. Roome et al. to the said Sistersville Brewing Company, together with the four story brick brewery building; the one story brick stable and wagon shed; the one story brick office; one story brick bottling house; the steam boilers and engines, ice plant, dynamos, tanks, hops, rice and other stock; cooperage, bottles, boxes, two wagons, harness, a fifteen ton ice plant complete, and all the property of any and every kind owned by the said Sistersville Brewing Company in the City of Sistersville, W. Va. The said plant is complete in all its details, was erected in 1906 and has only been operated as a brewery for a short time. It is run by steam and its own electric plant. Terms of sale cash on day of sale. Title to the property is believed to be good but selling as receiver I will only convey such title as is vested in me by said decree.

Dated this the 4th day of November, 1909.

J. HANFORD McCOY, *Receiver.*

This is to certify that bond with approved security has been given by J. H. McCoy, receiver, as required by said order of sale.

S. R. HARRISON,

Clerk C. C. U. S., N. D. W. Va.

This sale has been continued until Saturday, December 18, 1909.

J. HANFORD McCOY, *Receiver.*

39

Order of Dec. 22, 1909.

In Equity.

DETROIT STEEL COOPERAGE COMPANY

vs.

SISTERSVILLE BREWING COMPANY et al.

This day came the plaintiff, by Charles N. Kimball and George M. Hoffheimer, its counsel, and came also the defendants, Sistersville

Brewing Company, George W. Hartman, Bollinger Brothers, J. Hanford McCoy, in his own right and as receiver of Sistersville Brewing Company, by Thomas P. Jacobs and Arlen G. Swiger, their counsel. And thereupon the plaintiff tendered and filed its bill of complaint, duly verified under oath, with exhibits thereto annexed, and moved for a preliminary or provisional injunction pursuant to the prayer of said bill, enjoining and restraining the defendant, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company, until the further order of this court, from selling or offering or attempting to sell, under color of the decree of this court entered on the 30th day of October, 1909, in the cause in equity pending in this court wherein said George M. Hartman and Bollinger Brothers are plaintiffs and said Sistersville Brewing Company and others are defendants, or otherwise, the tanks, fixtures and fittings, or any of them constructed and furnished by, said plaintiff, and erected by said plaintiff in the brewery of said Sistersville Brewing Company, in the City of Sistersville, in the County of Tyler, and State of West Virginia, and particularly mentioned in the agreement of record in the office of the Clerk of the County Court of said County of Tyler in Deed of Trust Book Number thirteen, page three hundred and forty-one and from retaining or attempting to retain possession or custody of and from exercising, or attempting to exercise, any dominion or control over said tanks, fixtures and fittings; and also enjoining and restraining said George W. Hartman, Bollinger Brothers (otherwise called Bollinger Bros.), Sistersville Brewing Company, and the defendants, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of said County of Tyler, City of Sistersville, William E. Cummins, as collector and treasurer of said City of Sistersville, and J. Hanford McCoy, as receiver as aforesaid, and their and each of their agents, attorneys and counsel, until the further order of this court, from bringing on or prosecuting the reference to George E. Boyd, Jr., master commissioner, directed by said decree of the 30th day of October, 1909. And said motion came on this day to be heard upon said bill, and the exhibits therewith, and upon said appearance, and was argued by counsel, and of said motion the court takes time to consider. And on motion of said Hartman, Bollinger Brothers, Sistersville Brewing Company, and J. Hanford McCoy, in his own right and as receiver, it is ordered that they have leave to answer said bill within forty-five days from this date.

Enter: Decr. 22, 1909.

ALSTON G. DAYTON, *Judge.*

Subpœna in Chancery and Returns Thereon.

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Northern District of West Virginia, Greeting:

You are commanded to summon Sistersville Brewing Company, a corporation, under the laws of the State of West Virginia, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County of Tyler, West Virginia, City of Sistersville, a municipal corporation under the laws of the State of West Virginia, William E. Cummins as collector and treasurer of said City of Sistersville, all citizens of and residents in the Northern District of West Virginia, John S. Sell, as trustee, a citizen and resident in the borough of Greensburg, in the State of Pennsylvania, J. Hanford McCoy, a citizen and resident in said Northern District of West Virginia, in his own right and as receiver of said Brewing Company, Abijah Hays, as trustee, a resident and citizen of the State of Pennsylvania, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, all residents and citizens of the State of Pennsylvania, residing in the City of Pittsburg, in said State, George W. Hartman, a resident and citizen of the State of Pennsylvania, residing in the Borough of McKeesport, in said State, Bollinger Brothers, a corporation, under the laws of the State of Pennsylvania, and a citizen and resident of said State, having its principal office in the City of Pittsburg, in said State, and the County Court of Tyler County, West Virginia, a corporation under the laws of the State of West Virginia, and a resident and citizen of said state, if they be found in your District, to be and appear in the Circuit Court of the United States, for the Northern District of

41 West Virginia, aforesaid, at Rules to be held in the Clerk's office of said court, at Wheeling, on the first Monday in February next, to answer a certain bill in chancery, now filed and exhibited in said court against them by Detroit Cooperage Company, a corporation existing under the laws of the State of Michigan, citizen of and resident in the State of Michigan.

Hereof you are not to fail under the penalty of the law thence ensuing. And have then there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of January, A. D., 1910, and in the 134th year of the Independence of the United States of America.

Attest:

[SEAL OF COURT.]

S. R. HARRISON, *Clerk.*

Memorandum.

The said defendant- are required to enter their appearance in this suit in the Clerk's office of said court on or before the first Monday of February, 1910, otherwise the said bill may be taken pro confesso.
S. R. HARRISON, *Clerk.*

Attest:

— — —, *Clerk.*

Received this writ at Parkersburg, Wood County, W. Va., January 27th, 1910. Executed the same upon R. H. Skaggs, at Smithburg, Doddridge County, West Virginia, February 2, 1910, by leaving a duly certified copy thereon at the residence of the said R. H. Skaggs, with his wife, Laura Skaggs, she being a member of his family at the time of service and residing at Smithburg, County and State aforesaid, R. H. Skaggs not found.

F. Hogenmiller, John S. Sells, Abijah Hays, W. H. Kirk, Chas. Claus, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, Geo. W. Hartman, Ballinger Bros., a corporation, etc., non-residents; not found in my district.

JAMES E. DOYLE,

U. S. Marshal, N. D. W. Va.,

Per E. D. HUPP, *Deputy.*

Due and legal service of the within process is hereby accepted.
1/3/'10.

THE COUNTY COURT OF TYLER
COUNTY, WEST VIRGINIA,

By K. C. MOORE, *Prosecuting Att'y.*

42 Due and legal service of the within process is hereby accepted.

DANIEL J. O'NEILL,

J. T. LOUGHNUY,

*Mayor of City of Sistersville,
a Municipal Corporation.*

G. M. BEAVER,

GALE W. JUSTUS.

A. OSMAN.

W. E. CUMMINGS,

*Collector & Treas. of the City
of Sistersville, West Va.*

H. B. SHRIVER,

ex-Sheriff, Tyler Co., W. Va.

CLEM POLEN.

Service of within process accepted this 24th day of January, 1910.
for Sistersville Brewing Company, J. Hanford McCoy, & J. Hanford McCoy, receiver, George W. Hartman, Bollinger Brothers.

THOS. P. JACOBS,

ARLEN SWIGER,

Counsel.

Service of the within process accepted this the 25th day of Jane'y, 1910, for Charles Claus.

ARLEN G. SWIGER, *Counsel.*

Answer of George W. Hartman and Bollinger Brothers.

Filed Feb'y 28, 1910.

UNITED STATES OF AMERICA,

Northern District of West Virginia:

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY, Complainants,

vs.

GEORGE W. HARTMAN, BOLLINGER BROS., et al., Defendants.

The Answer of the Above Named Defendants to the Bill of Complaint Exhibited Against Them by the Above Named Complainant.

43 These defendants now and at all times hereafter saving and reserving to themselves all and all manner of benefits and advantages of exceptions which may be taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereto or to so much or such parts thereof as these defendants are advised that it is material or necessary for them to make answer unto, answering says: Defendants neither admit nor deny that the complaint is a corporation organized under the laws of the State of Michigan, having its principal office and place of business in the City of Detroit in the County of Wayne, in the State aforesaid, but does admit that the Sistersville Brewing Company is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, having its principal office and place of business in the City of Sistersville, County of Tyler and State of West Virginia; that the said George W. Hartman is a resident and citizen of the State of Pennsylvania residing in the borough of McKeesport, Pennsylvania, County of Allegheny and that the aforesaid Bollinger Brothers is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business in the City of Pittsburg, in the County of Allegheny and State of Pennsylvania, and is a resident and citizen of the State of Pennsylvania.

Defendants admit that Sistersville Brewing Company is the owner of a certain tract or parcel of land containing seven hundred and forty-one thousandths (741/1000) of an acre together with certain

buildings, fixtures, machinery, appliances and other property constituting a valuable brewery thereon situate, lying and being in the said City of Sistersville, County of Tyler and State of West Virginia.

Further answering defendants admit that a certain so called reservation of title reserving the title and ownership in and to the aforesaid complainant, the Detroit Steel Cooperage Company, of and to certain tanks, fixtures and fittings located in the plant of the said Sistersville Brewing Company of Sistersville, West Virginia, was duly recorded in the office of the Clerk of the County Court of Tyler County State of West Virginia in Deed of Trust Book No. 13, page 346 on the 7th day of December, 1908, and that the payments or purchase price of said tanks was to be made as follows: Two thousand (\$2,000.00) dollars when all of the tanks had been shipped, seven hundred and forty (\$740.00) dollars when erected in said brewery, twenty-seven hundred and forty (\$2,740.00) dollars in the form of a promissory note payable in three months from date

44 at six per cent. interest thereon, but as to the amount of the aforesaid sum that has been paid by the said Sistersville Brewing Company and the amount that is yet due and unpaid, the aforesaid defendants, George W. Hartman and Bollinger Brothers know nothing whatever. Further as to the executions of and delivery to the aforesaid complainants of the two certain promissory notes bearing date the 1st day of December, 1908, payable ninety days after date, these defendants are uninformed and know nothing concerning the facts which relate thereto, but respondents say said purchase money- for said tanks &c., were long since due and payable and according to the terms of said sale should have been paid long since and according to the terms of said sale are paid.

Further answering defendants admit that on the 1st day of December, 1906, said Brewing Company made, executed and delivered to John S. Sell, a non-resident of West Virginia, being cashier of Westmoreland National Bank of Greensboro, Pennsylvania, Trustee, a certain deed of trust in the nature of a mortgage, which deed of trust recited the intention of said Brewing Company to issue its eighty (80) bonds for the aggregate sum of forty thousand (\$40,000.00) dollars and each for the principal sum of five hundred (\$500.00) dollars bearing date the 1st day of December, 1906, with interest, payable semi-annually to be issued in seven series of which the first series including bonds of the aggregate principal sum of five thousand (\$5,000.00) dollars was to become due and payable on the 1st day of December, 1909, and that the remaining series were to become due and payable on subsequent days therein specified; that by said deed of trust said Brewing Company conveyed to said John S. Sell as Trustee, said tract or parcel of land hereinbefore mentioned, together with the brewery building, machinery and appliances thereon erected or to be erected with all the appurtenances thereto belonging, or in any wise appertaining and together with all the corporate rights and privileges of said Brewing Company for the use, benefit and security therein mentioned of the persons who might become the holders of said bonds secured thereby or any of them, and the said deed of trust was recorded in the office of the Clerk of

the County Court of Tyler County, West Virginia on the 2nd day of February, 1907, in Deed of Trust Book No. 13 page 7; and the said deed of trust was entered into and recorded prior to the making of the agreement hereinbefore mentioned between the above named complainant and the Sistersville Brewing Company.

Defendants admit that the bonds in said deed of trust mentioned as issued by said Sistersville Brewing Company are outstanding and unpaid, and that they are the holders of the majority of said bonds.

45 Further answering defendants deny that they, the said bondholders were active, and among the leading promoters of the organization of the said Sistersville Brewing Company and the construction and equipment of the same and that they knew nothing whatsoever of the execution of said deed of trust and of the necessity of the purchase on credit of the equipment and appliances such as tanks, fixtures and fittings and of the securing of the purchase money therefor by permitting the vendors to reserve title to the property purchased. Defendants allege that Bollinger Brothers is a corporation existing under the laws of the State of Pennsylvania, that its principal office is in the City of Pittsburg; that it engages in the business of building contractor, that it nor any of its officers knew anything whatever of the early organization of the Sistersville Brewing Company, but that said Brewing Company having been organized, the said Bollinger Brothers received the contract for the erection of the plant on the lot situate in the City of Sistersville, West Virginia, as aforesaid mentioned, but in compliance with said contract the said Bollinger Brothers furnished material and having erected the said plant the Sistersville Brewing Company were unable on account of the lack of funds, to pay them for their work and labor performed, that in lieu of this money due them on the contract price the said Bollinger Brothers received from the Sistersville Brewing Company, bonds and stock to the amount of the sum due them and that the said bonds now owned by them are the same bonds that they received for the construction of the plant; that said Bollinger Brothers never were officers of the Sistersville Brewing Company, were never connected with the management of the same and knew nothing whatever concerning the contracts that were entered into by the officers of the said Sistersville Brewing Company for material, fixtures, etc. Further, these defendants allege that George W. Hartman is a resident of McKeesport, Pennsylvania and is engaged in the real estate business; that sometime during the summer of 1908, in connection with a business transaction, he received the bonds issued by the Sistersville Brewing Company of Bollinger Brothers, for certain real estate sold by him the said George W. Hartman to the said Bollinger Bros., situate in Allegheny County, Pa., for which he was paid in bonds of said Brewing Company and that the bonds he now owns are the same bonds he received in payment for said real estate from the said Bollinger Bros., and at the time he made such trade he was not either a bondholder, stockholder nor creditor of the said Sistersville Brewing Company; that the said George W. Hartman knew nothing of the organization of the said Sistersville Brew-

ing Company and construction of its plant in the City of Sistersville, and that at the time he acquired the said bonds he was not acquainted in any way whatsoever with any of the officers of the said Brewing Company and had never been connected in any way whatsoever with the building of its said plant; that at the time the said George W. Hartman acquired the bonds of which he is now the owner the plant was substantially completed, in operation, and the produce of the same was on the market; that he knew nothing whatever of the contracts entered into between the officers of the said Sistersville Brewing Company and of any of the parties who furnished equipment and appliances for the said plant and that being in no way connected with the said Brewing Company he knew nothing whatever of the issuance of the aforesaid bonds and any necessity of purchasing material, fixtures or appliances on credit from said Detroit Steel Cooperage Company or any other person or firm; and it is further alleged that all the outstanding bonds of the said Sistersville Brewing Company have passed, through the course of trade and are now owned by parties who were not in any way connected with the early organization of the said Brewing Company and that they were not officers or stockholders in the said Brewing Company at the time when the said bonds were issued in the aforesaid contract *were* entered into between the Sistersville Brewing Company and the said Detroit Steel Cooperage Company.

Defendants admit that there is a record in the Clerk's office of the County Court of Tyler County in Trust Deed Book No. 13, page 135, a certain deed of trust, by which said deed of trust the said Sistersville Brewing Company conveyed to Obijah Hays, Trustee the tract or parcel of land before mentioned, together with the buildings and structures thereon located, in trust to secure W. H. Kirk the payment of a certain promissory note for the principal sum of ten thousand (\$10,000.00) dollars executed by said Brewing Company to said Kirk. Further that there appears of record in the clerk's office of the County Court of Tyler County in Trust Deed Book No. 13, page 361, a certain deed of trust by the terms of which the said Sistersville Brewing Company conveyed to Charles Claus, as Trustee the tract or parcel of land aforesaid, together with the buildings and structures located thereon to secure Carl Benz the payment of a promissory note for the particular sum of four thousand four hundred (\$4,400.00) dollars executed by said Brewing Company to said Benz, at the time of the execution of the aforesaid deeds of trust these defendants, George W. Hartman and Bollinger Brothers were not officers of the said Sistersville Brewing Company and as to the incidents relating thereto and as to any knowledge which they may have had of the necessity of purchasing material on credit these defendants know nothing whatever; that the said two deeds of trust are junior liens to the Bondholders' lien and are not necessary parties to this bill unless they redeem the bonds held and owned by the said Bondholders of the said Brewing Company.

Further answering, defendants admit that on the 9th day of April, 1909, they filed their bill in the Circuit Court of the United

States for the Northern District of West Virginia against the said defendants, the Sistersville Brewing Company et als., that they alleged in their said bill among other things that they, said Hartman and Bollinger Brothers were the owners of the majority of the bonds secured by said deed of trust executed to John S. Sell as Trustee as aforesaid mentioned that said Sell, Trustee, although often requested so to do in writing, — that he was a resident and citizen of the State of Pennsylvania living in the City of Greensburg, that said Brewing Company wholly neglected and refused to appoint a Trustee in the place and stead of the said Sell, although requested to do so in writing; that said Brewing Company had made default of its obligations under said deed of trust and was insolvent, that said Brewing Company had made default in the payment of taxes on its said property, and that in consequence thereof the property of the said Brewing Company had been levied upon by the sheriff of Tyler County, West Virginia and by the City of Sistersville, Tyler County, West Virginia; that numerous judgments had been obtained against said Brewing Company and by reason thereof the office furniture, fixtures and a part of the machinery of the said Brewing Company had been levied upon by the constable of Lincoln District, Tyler County, West Virginia, and that the plant was about to be dismantled, its usefulness destroyed and the property disposed of by said junior lienors. That these defendants prayed that *the* receiver might be appointed for the property of said Brewing Company that the said constables and sheriff might be restrained from selling or offering for sale any of the property levied upon by them; that said deed of trust executed to said Sell might be foreclosed and the liens of all parties holding liens on said property of said Brewing Company might be ascertained and that said property be sold for the purpose of paying off and discharging the liens upon same; that the principal and interest accrued upon said bond might be provided for by the decree of this Honorable Court and it might be entered therein and that said complainants might have such other relief by them, general and special as the necessities of their case might require and as to equity seem meet and proper; that this action had to be taken to protect their interests as said Sell, Trustee refused to act in the premises and said Brewing Company refused to select another trustee to act under said mortgage and said plant in part was advertised and would have been sold April 11, 1909.

48 Further answering defendants admit that by said bill filed on the 9th day of April, 1909, as aforesaid the said John S. Sell as Trustee was not joined as a party; further answering these defendants state that it was charged in the aforesaid bill that the said John S. Sell was a resident and citizen of the State of Pennsylvania, that although requested so to do in writing he refused to exercise his rights under said deed of trust, that said allegations have never been denied and are now confessed, and further that subsequent to the filing of said bill the said John S. Sell filed his resignation as said Trustee in this cause and therein stated that he refused to accept the trust and asked that he might be relieved therefrom; that the provision was made in the said deed of trust whereby the

officers of the said Sistersville Brewing Company could appoint a Trustee in the place and stead of the said John S. Sell and that although requested so to do in writing the said officers and directors of said Brewing Company wholly neglected and refused to appoint a successor to the said John S. Sell. Further that the said Sell being a non-resident of the State of West Virginia and having refused to submit to the jurisdiction of this Court and to execute the trust placed in him and take charge of and protect the property conveyed to him by said trust and having refused said trust, that in order that these plaintiffs might foreclose in equity that it is wholly unnecessary to make the said John S. Sell a party to this action or to appoint another Trustee in his place and stead; said Brewing Company declining to appoint another trustee as is provided by said mortgage or trust deed.

Further answering defendants admit that Abijah Hays, as Trustee for W. H. Kirk, Charles Claus as Trustee for Carl Benz, Feuchtwanger Brothers and the above named complainant were not made parties to the aforesaid bill as they are all junior lienors and unnecessary parties. Further answering these defendants specifically deny that they colluded and combined with the intent and purpose to conceal from this Honorable Court the non-joinder of the aforesaid parties and to fraudulently confer jurisdiction on this court for the very good reason they did not know of the existence of said liens. In answer thereto say that the complainants, the Detroit Steel Cooperage Company had actual and constructive knowledge of the execution of the deed of trust dated December 1st, 1906, by virtue of which the bonds now owned by these defendants were issued giving to these defendants a first lien on all the buildings, machinery and appliances thereon erected or to be erected and that by placing their said tanks etc. in the said brewery and attaching them thereto that the said tanks and fixtures thereof became a material part of the said plant and real estate subject to defendants' deed of trust of December 1st, 1906; that said Detroit Steel Cooperage Company, Hays, Kirk, Claus, Benz and Feuchtwanger Brothers were all subsequent lienors and as such were not necessary parties to these defendants' foreclosure of their first mortgage.

Further answering defendants admit that on the 30th day of October, 1909, this Honorable Court entered a decree in the said suit of George W. Hartman et als. vs. Sistersville Brewing Company et als. in and by which, it was adjudged, ordered and decreed that J. Hanford McCoy as receiver do sell at public auction, at the front door of said Brewing Company, all the property of said Brewing Company situate in the City of Sistersville consisting of said tract or parcel of land together with the buildings of all kinds and structures thereon erected and all the machinery, fixtures, implements, engines, boilers, office furniture etc., and that in and by the terms of said decree said cause was referred to George E. Boyd, Master Commissioner, to report the amount of the bonded and mortgage indebtedness of said Brewing Company, its principal and interest and the parties to whom due, and all other indebtedness of the said Brewing Company whether by liens or otherwise and any other matter re-

quired by any party and deemed pertinent by said master; that under authority conferred by said decree the said J. Hanford McCoy published notice that on Saturday, the 11th day of December, 1909, at two o'clock in the afternoon, he would offer for sale at public auction said tract or parcel of land together with the brewery building, stable and wagon shed, office, bottling house, steam boilers, engines, ice plant, dynamos, tanks, hops, rice, cooperage bottles, boxes, wagons, etc., and all other property of any kind owned by said Sistersville Brewing Company in said City of Sistersville. Defendants deny that they fraudulently combined and colluded together to procure the entry by this Honorable Court of the decree of sale and reference for the purpose of injuring any of the rights which the complainant or any other parties may have in this cause, that after the said entitled cause had been instituted in this Honorable Court an attempt was made by the Sistersville Brewing Company and a large majority of the creditors of the same to raise sufficient funds to pay the bonded indebtedness and all the outstanding claims against the said Brewing Company, that on or about the 25th day of October, 1909 a meeting was held in the City of Pittsburg which was attended by the officers and directors of the said Sistersville Brewing Company and a large number of the aforesaid creditors, the object of said meeting being to raise sufficient funds to pay the said indebtedness, but that the efforts of the said Brewing Company and creditors failed, and they well knowing that the plant was uninsured, that the rice,

hops and other material used in the manufacturing of beer
50 was becoming worthless and that the plant was greatly deteriorated in value because of the lack of operation, that they requested the said Hartman and Bollinger Brothers to have the aforesaid decree entered hoping that perhaps, that if the plant was sold immediately they would be able to secure at least a part of their claims and some consideration for the stock they owned in said Brewing Company. These defendants allege that the said Sistersville Brewing Company, Abijah Hays as Trustee for W. H. Kirk, and Charles Claus as Trustee and a great majority of the creditors of the said company were represented at this meeting and at their instance and request they fearing that the said plant might be destroyed by fire or be rendered worthless by lack of operation, requested that the aforesaid decree be entered, and were then and still are satisfied to have said sale made and the plant sold and the transaction closed up by this Court.

Defendants further represent that they charge in their said bill filed in the said cause of George W. Hartman et als. vs. Sistersville Brewing Company et als., that the said Brewing Company was insolvent, that it had made default in the payment of taxes and insurance, that it had ceased operation because of the inability to pay for labor and material, that there was no probability that in its present condition it could pay off and discharge its indebtedness and that as a result of said indebtedness the said executions as mentioned above, the said Brewery plant was liable to be irreparably injured and damaged, and that these defendants did not request this Honorable Court to enter the decree aforesaid until every effort had been exhausted

by the said Brewing Company and creditors as aforesaid to discharge the said indebtedness, and that as indicated by said decree the same was consented to by all the unsecured creditors, the said Brewing Company, the County Court of Tyler County and numerous other parties, and of these efforts of said Hartman, Bollinger Brothers and others to try and save the plant from forced sale, said Detroit Steel Cooperage Company had full knowledge.

These defendants, *for their* answering say, that they admit that the said tanks placed in said brewery by the said Detroit Steel Cooperage Company are used for the purpose of storing the beer manufactured in said plant and for the purpose of coloring and aging the same. Further these defendants deny that the said tanks are not connected in any visible way or manner to the said Brewery and walls thereof, but allege that the said tanks are connected with pipes, rubber hose and numerous fittings, that said tanks were placed in the said brewery before the completion of the walls of the same; that in order to remove the said tanks it would be necessary to *tare* out a large portion of the wall of the said plant; that the said tanks
51 are located on the first floor of the said plant, that the building is a brick, four stories high and that to tear out a portion of the wall of sufficient size to allow these said tanks to be removed, would greatly injure the entire building and would impair and deteriorate the value of the same; that the said complainants sold and delivered the said tanks and appliances to the said Sistersville Brewing Company to be permanently attached to the real estate upon which the said deed of trust of December 1st, 1906, as aforesaid mentioned is a first lien, that the said tanks and fixtures are too large to pass out of the said building through any opening now existing, that they were placed in the said building with the design of permanent use therein, that they are essential for the use to which the building was erected and designed and are especially adapted to that place; that the said brewery could not be operated, and that the product of the same could not be manufactured without the use of these said tanks, that the unity between the said tanks and the said building is such that they must be regarded as fixtures, that they cannot be removed without injuring and impairing the value of the real estate and buildings thereon; that the said Cooperage Company sold the said tanks and fixtures to the said Brewing Company to be permanently attached thereto, and are a material, useful and necessary part of the construction of said plant. They well know that the deed of trust and the mortgage bonds issued thereunder the date, December 1st, 1906, and duly recorded on the 2nd day of February, 1907, were the first liens upon the said parcel of land, brewery buildings, machinery and appliances thereon erected or to be erected, that they took the chance of success of finally realizing the residue of the purchase money out of the future earnings of the said Brewing Company as manifested by the credit which they extended to the said Brewing Company; that their said tanks and fittings having become a material part of said plant and real estate, they are now estopped from asserting any right or priority on the property of the proceeds of the

sale thereof to the injury of the security of these defendants and that they must be regarded as having waived their rights, if any, against such prior liens.

Defendants deny that they have in any wise infringed on the rights of the complainants as alleged in their said bill or otherwise, and deny that they have colluded and combined with the said Sistersville Brewing Company and certain other creditors or with any *or with any creditors*, person, persons or corporations whatever for the purpose of injuring them in any way or manner whatever. Defendants allege that they are the innocent owners of a majority of the said first mortgage bonds as above mentioned; that they have
52 the right to institute this their proceeding to foreclose the said deed of trust and mortgage and that they are entitled to the relief prayed for in their said bill.

Defendants deny that complainant is entitled to any relief whatsoever or any part of their relief in said bill of complaint demanded; further that they are not entitled to a provisional and preliminary right of injunction to be directed to the said J. Hanford McCoy et als., Receiver, George E. Boyd, Master Commissioner, et als., and allege that the complainant has no standing in this court or any court of equity.

Defendants pray in all things the same benefit and advantage in this their answer as if they had pleaded or demurred to the said bill of complaint.

These defendants deny any and all manner of unlawful acts whatsoever, whereof *it is* in any wise by the said bill of complaint charged; and all of which matters and things these defendants are ready and willing to prove as this Honorable Court shall direct and prays that the said bill may be dismissed with costs.

GEO. W. HARTMAN,
BOLLINGER BROS., *Defendants*,
By COUNSEL.

THOS. P. JACOBS,
ARLEN G. SWIGER,
Counsel for Defendants.

STATE OF WEST VIRGINIA,
County of Tyler:

United States Court for the Northern District of West Virginia.

George W. Hartman, being duly sworn, deposes and says that he is one of the defendants in the above entitled cause. He has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

GEORGE W. HARTMAN.

Subscribed and sworn to before me this 27th day of January, 1910.

ARLEN G. SWIGER,
Notary Public.

53

Replication.

Filed March 5, 1910.

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY
v.
SISTERSVILLE BREWING COMPANY et al.

The Replication of Detroit Steel Cooperage Company, Complainant, to the Answer of George W. Hartman and Bollinger Brothers, Defendants.

This replicant saving and reserving to itself now and at all times hereafter all and all manner of advantage of exception which may be had and taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this: that any other matter or thing whatsoever in the said answer contained, material or effectual, in the law to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by its said bill it has already prayed.

CHARLES N. KIMBALL,
GEO. M. HOFFHEIMER,
Counsel for Complainant.

Alias Subpœna and Return Thereon.

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Northern District of West Virginia, Greeting:

You are again commanded to summon Sistersville Brewing Company, a corporation, under the laws of the State of West Virginia, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman,

54 Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County of Tyler, West Virginia, City of Sistersville, a municipal corporation under the laws of the State of West Virginia, William E. Cummins as collector and treasurer of said City of Sistersville, all citizens of and residents in the Northern District of West Virginia, John S. Sell, as trustee, a citizen and resident in the borough of Greensburg, in the State of Pennsylvania, J. Hanford McCoy, a citizen and resident in said Northern District of West Virginia, in his own right and as receiver of said Brewing Company, Abijah Hays, as trustee, a resident and citizen of the State of Pennsylvania, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, all residents and citizens of the State of Pennsylvania, residing in the City of Pittsburg, in said State, George W. Hartman, a resident and citizen of the State of Pennsylvania, residing in the Borough of McKeesport, in said State, Bollinger Brothers, a corporation, under the laws of the State of Pennsylvania, and a citizen and resident of said State, having its principal office in the City of Pittsburg, in said State, and the County Court of Tyler County, West Virginia, a corporation under the laws of the State of West Virginia, and a resident and citizen of said state, if they be found in your District, to be and appear in the Circuit Court of the United States, for the Northern District of West Virginia, aforesaid, at Rules to be held in the Clerk's office of said court, at Wheeling, on the first Monday in April next, to answer a certain bill in chancery, now filed and exhibited in said court against them by Detroit Steel Cooperage Company, a corporation existing under the laws of the State of Michigan, citizen of and resident in the State of Michigan.

Hereof you are not to fail under the penalty of the law thence ensuing. And have then there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of March, A. D., 1910, and in the 134th year of the Independence of the United States of America.

Attest:

[SEAL OF COURT.]

S. R. HARRISON, *Clerk*.

Memorandum.

The said defendant- are required to enter their appearance in this suit in the Clerk's office of said court on or before the first Monday of April, 1910, otherwise the said bill may be taken pro confesso.

S. R. HARRISON, *Clerk*.

Attest:

— — —, *Clerk*.

U. S. Marshal's Return.

Circuit Court of the United States, Northern District of W. Va.

Received this writ at Parkersburg, West Virginia, March 16, 1910. Executed the same the same day at Parkersburg, West Virginia, upon Abijah Hays, trustee, etc., by exhibiting to him the original writ and at the same time leaving with him a duly certified copy thereof.

JAMES E. DOYLE,
U. S. Marshal, N. D. W. Va.,
By HAL M. RAPP,
Office Deputy.

Affidavit for Warning Order.

Filed March 14, 1910.

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY

v.

SISTERSVILLE BREWING COMPANY et al.

UNITED STATES OF AMERICA,
Northern District of West Virginia,
County of Harrison, ss:

George M. Hoffheimer, being duly sworn on his oath, deposes and says that he is of counsel for Detroit Steel Cooperage Company, plaintiff in the above entitled cause; that the writ of subpoena heretofore duly issued in this cause, returnable to February Rules, 1910, has been duly returned by the United States Marshal for the Northern District of West Virginia, not found, as to the defendants, F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz, and Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners under the firm name and style of Feuchtwanger Brothers; that said defendants were not, before or at the time of the commencement of this suit, nor have they been at any time since, nor are they now, residents or inhabitants of the State of West Virginia, or the Northern District thereof; that said defendants respectively resided, before and at the time of the commencement
56 of this suit and at all times since have resided, and still do reside, in the State of Pennsylvania, at the places following, to-wit: F. Hogenmiller, in the borough of Jeannette, in the County of Westmoreland; John S. Sell, as trustee, in the borough of Greensburg, in the County of Westmoreland; Carl Benz, W. H. Kirk,

Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, in the City of Pittsburg, in the County of Allegheny; that the said defendants have not voluntarily appeared thereto.

Affiant further says that the defendant J. Hanford McCoy, as receiver, was before and at the time of the commencement of this suit, and Ohio Valley Brewing Company, a corporation, organized and existing under and by virtue of the laws of the State of West Virginia, having its principal office and place of business in the City of Sistersville, in the County of Tyler and State of West Virginia, after the commencement of this suit became and was, and now is, the person in possession or charge of the property in the bill mentioned.

Affiant further says the foregoing statements and allegations in this affidavit contained, are made by him upon information and belief; that he is informed, and verily believes that all of said statements and allegations are true; that this affidavit is made by him, for the reason that the plaintiff is a corporation, having its office and place of business at the City of Detroit, in the County of Wayne, and State of Michigan, and has not, so far as is known to affiant, any officer or agent in the Northern District of West Virginia. Affiant further saith not.

GEO. M. HOFFHEIMER.

Taken, subscribed and sworn to before me, this 11th day of March, 1910.

[SEAL.]

HARRY W. SHEETS,
*Notary Public in and for the County
of Harrison, West Virginia.*

My commission expires Dec. 15, 1919.

Warning Order of March 14, 1910.

In Equity.

DETROIT STEEL COOPERAGE COMPANY

v.

SISTERSVILLE BREWING COMPANY et al.

This day came the plaintiff and filed the affidavit of George M. Hoffheimer, and it appearing that the defendants, F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz, and Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners under the firm name and style of Feuchtwanger Brothers, were not before or at the time of the commencement of this suit, nor have they been at any time since, nor are they now, residents or inhabitants of the State of West Virginia, nor are they found in said State or District, that they have not voluntarily appeared thereto, and that J. Hanford McCoy, as receiver, was before and at the time of the commencement of this suit, and

Ohio Valley Brewing Company, a corporation, after the commencement of this suit became and now is, the person in possession or charge of the property in the bill mentioned; on motion of the plaintiff, it is ordered by the court that F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz, and Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners as aforesaid, do appear, plead, answer or demur by the ninth day of April, 1910, and that this order be served on said F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz, and Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners as aforesaid, J. Hanford McCoy, as receiver, and Ohio Valley Brewing Company, on or before the twenty-fourth day of March, 1910, by delivering to each of them a certified copy of this order.

Enter: March 14, 1910.

ALSTON G. DAYTON, *Judge*.

Return of Service of Warning Order.

Made known March 24, 1910, to the within named defendants John S. Sell and F. Hogenmiller by leaving a true and attested copy of the within writ thereof to each of them personally.

So Ans.

J. E. SHIELDS,

Sheriff of Westmoreland County, Penna.

STATE OF PENNSYLVANIA,

County of Allegheny, ss:

Before me the undersigned, a notary public in and for said county, personally came Cornelius Barry, a constable of First Ward, City of Pittsburgh, in said county, who being first duly sworn, says that he served the within order, on the within named W. H. Kirk and

58 Carl Benz in the City of Pittsburgh, in said County, on the 24th day of March, 1910, in person by delivering to each of said parties a true and attested copy thereof and exhibiting to them the original with the seal of the court thereon; and also served Henry, Joseph and Aaron Feuchtwanger, partners doing business under the firm name of Feuchtwanger Bros. at their place of business in said city on the 24th day of March, 1910, by delivering to Aaron Feuchtwanger, one of said partners, a true and attested copy of said order and exhibiting to him the original, together with the seal of the court thereon.

CORNELIUS BARRY.

Sworn to & subscribed before me this 25th day of March, 1910.

[SEAL.]

D. E. MITCHELL,

Notary Public, Allegheny County, Pa.

My commission expires January 16th, 1911.

2nd Affidavit for Warning Order.

Filed April 14, 1910.

In the Circuit Court of the United States for the Northern District
of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY

vs.

SISTERSVILLE BREWING COMPANY et al.

UNITED STATES OF AMERICA,

*Northern District of West Virginia,**County of Harrison, ss:*

George M. Hoffheimer, being duly sworn, on his oath, deposes and says that he is of counsel for Detroit Steel Cooperage Company, plaintiff in the above entitled cause; that the writ of subpoena heretofore duly issued in this cause, returnable to February Rules, 1910, has been duly returned by the United States Marshal for the Northern District of West Virginia, not found as to the defendants, F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz, and Henry Feuchtwanger, Joseph Feuchtwanger, and Aaron Feuchtwanger, partners under the firm name and style of Feuchtwanger Brothers; that said defendants were not before or at the time of the commencement of this suit, nor have they been at any time since, nor are they now, residents or inhabitants of the State of West Virginia, or the Northern District thereof; nor are they
59 found in said State of West Virginia or the Northern District thereof; that said defendants respectively resided, before and at the time of the commencement of this suit and at all times since have resided, and still do reside in the State of Pennsylvania, at the following places, to-wit: F. Hogenmiller, in the Borough of Jeanette, in the County of Westmoreland; John S. Sell, as trustee, in the Borough of Greensburg, in the County of Westmoreland; Carl Benz, W. H. Kirk, Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, in the City of Pittsburg, in the County of Allegheny; and that said defendants have not voluntarily appeared thereto.

Affiant further says that the defendant, J. Hanford McCoy, as receiver, was before and at the time of the commencement of this suit, and Ohio Valley Brewing Company, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, having its principal office and place of business in the City of Sistersville, in the County of Tyler, and State of West Virginia, after the commencement of this suit became and was, and now is, the person in possession or charge of the property in the bill mentioned.

Affiant further says the foregoing statements and allegations in

this affidavit contained, are made by him upon information and belief; that he is informed, and verily believes that all of said statements and allegations are true; and that this affidavit is made by him, for the reason that the plaintiff is a corporation, having its office and place of business at the City of Detroit, in the County of Wayne and State of Michigan, and has not, so far as is known to affiant, any officer or agent in the Northern District of West Virginia.

Affiant further says that the order entered in this cause on the 14th day of March, 1910, was improperly served on all of the defendants, except J. Hanford McCoy, as receiver, and Ohio Valley Brewing Company, and no service thereof ever was made on J. Hanford McCoy, as receiver, or said Ohio Valley Brewing Company; that said improper service and omission of service were first brought to the knowledge of this affiant on this 9th day of April, 1910.

Affiant further said not.

GEORGE M. HOFFHEIMER.

Taken, subscribed and sworn to before me this 9th day of April, 1910.

[SEAL.]

HARRY W. SHEETS,
*Notary Public in and for the County
of Harrison, West Virginia.*

My commission expires Dec. 15, 1919.

60

Warning Order of April 14, 1910.

In Equity.

DETROIT STEEL COOPERAGE COMPANY
v.
SISTERSVILLE BREWING COMPANY et al.

This day again came the plaintiff and filed the affidavit of George M. Hoffheimer, and it appearing that the defendants F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz, and Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners under the firm name and style of Feuchtwanger Brothers, were not, before or at the time of the commencement of this suit, nor have they been at any time since, nor are they now, residents or inhabitants of the State of West Virginia, or of the Northern District of West Virginia, nor are they found in said State or District; that they have not voluntarily appeared thereto; that J. Hanford McCoy, as receiver, was before and at the time of the commencement of this suit, and Ohio Valley Brewing Company, a corporation, after the commencement of this suit became and now is, the person in possession or charge of the property in the bill mentioned; and that the order entered in this cause on the 14th day of March, 1910, has not been properly served; on motion of the plain-

tiff it is ordered by the court that said order of the 14th day of March, 1910, and the service thereof be and the same is hereby vacated and set aside; that said F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz, and Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners as aforesaid, do appear, plead answer or demur by the 30th day of April, 1910; and that this order shall be served on said F. Hogenmiller, John S. Sell, as trustee, W. H. Kirk, Carl Benz and Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, partners as aforesaid, J. Hanford McCoy, as receiver, and Ohio Valley Brewing Company, on or before the twentieth day of April, 1910, by delivering to each of them a certified copy of this order, such service to be made by the United States Marshals of the respective districts in which such service shall be made, or by the deputy or deputies of such United States Marshals.

Enter: Apl. 14, 1910.

ALSTON G. DAYTON, *Judge*.

61

Return of Service of Order of April 14, 1910.

And now, 15 April, 1910. I hereby accept due and legal service of the within notice.

JOSEPH FEUCHTWANGER.

UNITED STATES OF AMERICA,

Western District of Pennsylvania, ss:

I hereby certify and return that I served the within order, on the within named F. Hogenmiller, by giving him a true and attested copy thereof personally, at Jeanette, Pa., on the 18th day of April, A. D., 1910.

On John S. Sell, as trustee, by giving him a true and attested copy thereof personally, at Greensburg, Pa., on the 18th day of April, A. D., 1910.

On W. H. Kirk, by giving him a true and attested copy thereof, personally at Pittsburgh, Pa., on the 18th day of April, A. D., 1910.

On Aaron Feuchtwanger, by leaving a true and attested copy thereof at his dwelling house or usual place of abode, with an adult member or resident in his family, at Pittsburgh, Pa., on the 18th day of April, A. D., 1910.

On Carl Benz, by leaving a true and attested copy thereof at his dwelling house or usual place of abode, with an adult member or resident in his family, at Pittsburgh, Pa., on the 18th day of April, A. D., 1910.

On Henry Feuchtwanger, by leaving a true and attested copy thereof at his usual place of abode with an adult person who resides therein, at Pittsburgh, Pa., on the 19th day of April, A. D., 1910.

N. E. I. as to Joseph Feuchtwanger.

So ans.

ESNOS HADSELL PORTER,

U. S. Marshal,

By GEO. S. OWENS, *Deputy*.

Clerk's Entry of the Return of the Marshal of N. D. W. Va. of Service of Order of April 14, 1910, the Original Return of the Marshal Being Lost.

"Apr. 27, 1910, U. S. Marshal of this District, returns same served upon Ohio Valley Brewing Co. by J. H. McCoy, Att'y in fact & upon J. H. McCoy, Receiver."

62

Appearance of F. Hogenmiller.

Filed April 30, 1910.

UNITED STATES OF AMERICA,
Northern District of West Virginia:

DETROIT STEEL COOPERAGE COMPANY, Complainant,
vs.

GEORGE W. HARTMAN, BOLLINGER BROS., et als., Defendants.

To the Clerk of the Circuit Court for said District:

Please enter the appearance of A. T. Smith, of Parkersburg, West Virginia, and W. P. Robinson, of Wheeling, West Virginia, as attorneys for F. Hogenmiller, one of the defendants in the above suit.
Very Resp.,

A. T. SMITH.
W. P. ROBINSON.

Demurrer of F. Hogenmiller.

Filed April 30, 1910.

UNITED STATES OF AMERICA,
Northern District of West Virginia:

In the United States Circuit Court for said District.

DETROIT STEEL COOPERAGE COMPANY, Complainant,
vs.

GEORGE W. HARTMAN, BOLLINGER BROS., et als., Defendants.

The Demurrer of F. Hogenmiller. One of the Defendants in the Above-entitled Suit.

This 30th day of April, 1910, the said F. Hogenmiller, appeared by his attorneys, A. T. Smith, of Parkersburg, West Virginia, and W. P. Robinson, of Wheeling, West Virginia, and demurs to the said complainant's bill because of the many errors, uncertainties, imperfections and insufficiencies appearing on the face of said bill.

63 For further cause of demurrer the said defendant says that the said bill does not show the nature of the said defendant's claim and does not show that the judgment which said defendant secured in the court of J. H. Marshall, J. P., for Tyler County, West Virginia, was not a valid and existing lien against the property mentioned in complainant's bill, by reason of the lien laws made and enacted, and that the said bill does not show the nature of defendant's claim, so that it could be determined as to whether or not the claim of this defendant had priority over the claim of said complainants by reason of the lien this defendant had for work and labor performed.

For further cause of demurrer this defendant says that there is no equity in the complainant's bill.

F. HOGENMILLER,
By A. T. SMITH &
W. P. ROBINSON,
His Attorneys.

Order of June 28, 1910, Overruling Demurrer, etc.

In Equity.

DETROIT STEEL COOPERAGE COMPANY

v.

SISTERSVILLE BREWING COMPANY et al.

It appearing to the court that the defendants Sistersville Brewing Company, Gale Justus, R. H. Skaggs, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the county of Tyler, City of Sistersville, William E. Cummins, as collector and treasurer of said City of Sistersville, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company, Abijah Hays, as trustee, Charles Claus, as trustee, and County Court of Tyler County, have been duly served with subpoenas, and that the defendants John S. Sell, as trustee, W. H. Kirk, Carl Benz, Henry Feuchtwanger, Aaron Feuchtwanger and Joseph Feuchtwanger, and also J. Hanford McCoy, as receiver as aforesaid, and Ohio Valley Brewing Company, have been duly served with the order entered in this cause on the 14th day of April, 1910, as therein directed, and that none of the defendants has appeared or filed any plea, answer or demurrer herein and that the time for doing so has expired, and that the defendant F. Hogenmiller has been duly served with said order, and filed a demurrer not certified by counsel or verified as required by the Equity Rules, on motion of the plaintiff, by

64 Charles N. Kimball and George M. Hoffheimer, its counsel, it is ordered that said demurrer be and it is hereby stricken from the files, and that the bill of complaint be, and the same is hereby taken for confessed as to and against said Sistersville Brewing Company, Gale Justus, R. H. Skaggs, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County

of Tyler, City of Sistersville, William E. Cummins, as collector and treasurer of said City of Sistersville, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company, Abijah Hays, as trustee, Charles Claus, as trustee, and County Court of Tyler County, John S. Sell, as trustee, W. H. Kirk, Carl Benz, Henry Feuchtwanger, Aaron Feuchtwanger, Joseph Feuchtwanger and F. Hogenmiller.

Enter: June 28, 1910.

ALSTON D. DAYTON, *Judge.*

Depositions on Behalf of Plaintiff.

Filed Feb'y 4, 1911.

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY, a Corporation,

vs.

SISTERSVILLE BREWING COMPANY, a Corporation; GEORGE W. HARTMAN, and BOLLINGER BROTHERS and Others.

In this cause it is hereby agreed and stipulated between the respective parties thereto, by their solicitors, that the testimony therein shall be taken orally, and that it shall be taken down stenographically and then transcribed in long hand, and the signatures of the witnesses to such transcribed testimony are waived. It is further agreed and stipulated that the taking of the testimony shall begin on Tuesday, January 31st, 1911, before Fred A. Behr, notary public, No. 84, Griswold Street, Detroit, Michigan, at 9:30 o'clock A. M. and shall continue from time to time thereafter.

CHAS. N. KIMBALL,

Attorney for Plaintiff.

ARLEN G. SWIGER,

THOS. P. JACOBS,

Attorneys for Defendants.

65 In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY, a Corporation, Plaintiff,

vs.

SISTERSVILLE BREWING COMPANY, a Corporation; GEORGE W. HARTMAN, and BOLLINGER BROS. and Others.

Depositions of witnesses taken before me Fred A. Behr, Notary Public in and for Wayne County, Michigan, at No. 84 Griswold

street, Detroit, Michigan, in said County and State, between the hours of 10 o'clock A. M. and 5 o'clock P. M. on the 31st day of January, 1911, to be read in evidence in a certain suit in equity, now pending in the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling, West Virginia, in which Detroit Steel Cooperage Company, a corporation, is plaintiff, and Sistersville Brewing Company, a corporation, and others are defendants, and to be read in evidence on behalf of the said plaintiff.

It is agreed that the depositions of said witnesses shall be taken stenographically by Charles M. Hammond, and then transcribed into longhand; and said depositions are taken pursuant to the attached agreement between solicitor for the plaintiff and solicitors for the defendants.

Present:

Charles N. Kimball of counsel for plaintiff.

Hon. Thomas P. Jacobs and Arlen G. Swiger of counsel for defendants.

HENRY C. WIEDEMAN, a witness of lawful age, being produced on behalf of the plaintiff and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Charles N. Kimball, counsel for plaintiff, as follows:

Q. State your name, age and residence?

A. Henry C. Wiedman; age 37; residence, Detroit, Michigan.

Q. What is your business or occupation?

A. President and General Manager of the Detroit Steel Cooperage Company.

Q. How long have you been President and General Manager of the Detroit Steel Cooperage Company?

A. I have been Manager since the Company started in 1902, and President for the last—about two years, I guess.

66 Q. Under the laws of what State if the Detroit Steel Cooperage Company incorporated?

A. Michigan.

Q. Where are its offices and place of business?

A. Detroit.

Q. What business is the Detroit Steel Cooperage Company in?

A. Manufacturers of glass and enamelled steel tanks.

Q. For what purposes?

A. For breweries, creameries, &c.

Q. You may state, Mr. Wiedeman, whether or not the Detroit Steel Cooperage Company entered into a contract with the Sistersville Brewing Company, one of the defendants in this action, for the sale and purchase of steel tanks?

A. They did, yes.

Q. When was that?

A. In 1908.

Q. Who negotiated that purchase for the Sistersville Brewing Company?

A. For the Sistersville Brewing Company, Bollinger Bros., of Pittsburg.

Q. Was a sale made to the Sistersville Brewing Company, in pursuance of the negotiations with Bollinger Bros.?

A. Yes.

Q. Please explain how it was that Bollinger Bros. negotiated the sale for the Sistersville Brewing Company, for the purchase of those tanks from you?

A. We had a contract with Bollinger Bros., some time prior to that, or about the time when Bollinger Bros. had a contract for the building of the brewery. When they came to Detroit they made a contract with us for the furnishing of these tanks. Later they had some trouble with the brewing company, as I understood it, and the plant laid idle for some time, during which time we held the tanks, and used some of them for other purposes, and then completing the order again when we got slack, until we heard from them again, when they took up the matter for the Sistersville Brewing Company, with a view of having us deliver the tanks to the Brewing Company.

Q. What became of the contract that you had entered into with Bollinger Bros., for tanks for the Sistersville Brewing Company?

A. I still have the original contract.

Q. Was that contract cancelled?

A. Yes, it was cancelled; I think it was cancelled verbally at the time we made the agreement with the Sistersville Brewing Company, on the terms as negotiated by Bollinger Bros.

Q. I hand you a letter dated June 27th, 1908, dated Pittsburg, Pa., and addressed to The Detroit Steel Cooperage Co., Detroit, Mich., and signed Bollinger Bros., S. W. Bollinger, President; and ask you if that letter was received by the Detroit Steel Cooperage Company from Bollinger Bros.?

A. Yes, this is the letter received by our company.

Q. Will you read the letter please?

A. —.

67

"PITTSBURG, PA., *June 27th*, 1908.

The Detroit Steel Cooperage Co., Detroit, Mich.

GENTLEMEN: We settled up with the Sistersville Brewing Co., sometime ago, they accepting the Brewery off our hands in an un-completed condition, giving us stock and bonds for our claim.

They are now getting in shape to complete the plant, which we have obligated ourselves to do for the credit which we gave them in our settlement. They ask us to let them know how soon we could install the steel cooperage providing they can raise the necessary money, and shall ask you to kindly let us know just what shape you have this work in.

Yours very truly,

BOLLINGER BROS.
S. W. BOLLINGER, *Pres't.*"

S. W. B., B. M. D.

Q. Will you file that letter with and as a part of your deposition, marked "H. C. W. No. 1"?

A. Yes.

Letter marked Exhibit H. C. W. No. 1.

Q. I will ask you Mr. Wiedeman to state whether or not the letter which has been filed as a part of your evidence, or testimony, was the opening or commencement of negotiations by Bollinger Bros., in which they negotiated the purchase of the tanks for the Sistersville Brewing Company?

A. Yes, that was the beginning of the negotiations.

Q. Who was the contract for the sale of the 13 tanks to the Sistersville Brewing Company entered into with?

A. It was entered into with the Sistersville Brewing Company, by its Secretary.

Q. And what was his name?

A. W. H. Kirk.

Q. I will ask you if you had any communications with W. H. Kirk before the signing of the contract of sale for these tanks?

A. Not in the way of negotiations, no; the negotiating was all done by Bollinger Bros., when we heard from them the terms and so forth had been agreed upon.

Q. I here hand you a letter, dated Pittsburg, Pa., July 29th, 1908, 800 Keenan Building, addressed to "The Steel Enameled Cooperage Co., Detroit, Mich.," and signed "Sistersville Brewing Company, Per

W. H. Kirk, Sec.," and ask if that letter was received by
68 Detroit Steel Cooperage Company?

A. Yes, this was received by the Detroit Steel Cooperage Company.

Q. Is there any memorandum or initial on the letter by which you can identify the date received, and whom it was answered by?

A. Yes, my own marks on here.

Q. Will you please read the letter?

A. —.

"PITTSBURG, PA., *July* 29, 1908.

The Steel Enameled Cooperage Co., Detroit, Mich.

GENTLEMEN: I have been in consultation with Mr. S. W. Bollinger this week and he presented to me a letter from you stating that possibly we could make some arrangement whereby you would be enabled to place the entire quantity of cooperage in the Brewery at once. I would like very much if it was possible for us to arrange matters so this could be done. In regards to notes, I will say that we, at the present time, would be glad to negotiate a note for the balance, over \$2,000.00 of the \$5,480.00, for three months with the privilege of six, also with the privilege of paying the notes at any time. At the present time we have prospects of sale of the remainder of our stock, and if so, it would be a very short time until we would be able to take care of the note. At the present time we owe nothing but a few thousand dollars on the plant. This is entirely for supplies which we have been using lately. Our plant, as far as it has gone, is en-

tirely paid for, which cost us \$177,000.00, on which we have \$40,000.00 of bonds issued. We have at present 1,400 barrels of beer near three months old, which we wish to put on the market, but are unable to put it on the market until we get the chip casks. Just as soon as we get the casks in, we will be able to get this on the market and get an income. However, we do not intend to depend upon the income from the Brewery for your note, as we have still in the treasury \$20,000.00 of stock, which we are selling with the expectation of using them for notes and the remainder of this for machinery needed, which includes your enameled tanks. If this is satisfactory to you, and if you will send notes to me at once, I will have them arranged and returned to you, and if you will see fit to arrange these notes with the present conditions, please ship cooperage at once.

Very respectfully,

SISTERSVILLE BREWING COMPANY,
Per W. H. KIRK, Sec.

69 P. S.—We have quite a good deal of the \$20,000.00 stock subscribed for already, but the money will not be in, some of it, for one, two and three months as those who have subscribed for it have the money in the Building & Loan Association, and are unable to get it, some, for three months, etc. Hoping to hear from you at once, I am,

Respectfully,

W. H. KIRK, Sec'y."

I made a notation on that "Wrong address, delivery delayed. Received Aug. 3, 1908. Answered Aug. 3, 1908, Answered by W."

Q. I will ask you if you will file that letter with and as a part of your deposition in this case, marked H. C. W. No. 2?

A. Yes, sir.

Paper marked Exhibit H. C. W. No. 2.

Q. Does any reason appear on the face of that letter why the delivery to you was delayed, as appears by your note made at the time?

A. On account of the wrong name. It should have been Detroit Steel Cooperage Company, instead of "The Steel Enameled Cooperage Co."

Q. Was this the first letter or communication you had had from the Sistersville Brewing Company or W. H. Kirk?

A. Yes, the first one.

Q. I will ask you whether, in accordance with that letter, the Detroit Steel Cooperage Company entered into a contract with the Sistersville Brewing Company for the sale of any steel tanks, or chip tanks?

A. Yes, I think it was shortly after that.

Q. I here hand you a paper, endorsed on the back: "Proposal from Detroit Steel Cooperage Co., Detroit, Mich., to Sistersville, Brewing Co., Sistersville, W. Va.," and signed "Detroit Steel Cooperage Com-

pany, by H. C. Wiedeman, Gen'l Mgr.," and by "Sistersville Brewing Co., by W. H. Kirk, Sec'y," and dated August 8th, 1908, and ask you if that is the original contract of sale entered into by Detroit Steel Cooperage Company with the Sistersville Brewing Company?

A. Yes, that is the one.

Q. Will you state what articles the terms of that contract called for the sale of by the Detroit Steel Cooperage Company, and the purchase of by Sistersville Brewing Company?

Judge JACOBS: Does not the contract show that?

70 Q. Yes.

A. Thirteen glass enameled steel tanks.

Q. And at what price, or on what terms?

A. Price \$5,480.00.

Q. Are any terms of payment expressed?

A. Yes.

Q. What are they?

A. "\$2,000.00 when all of the tanks have been shipped. 740.00 when erected at Brewery and tested. 2,740.00 in the form of a promissory note, payable in three months from date with 6% interest per annum."

Q. Will you file the original contract of sale from Detroit Steel Cooperage Company to Sistersville Brewing Company with and as a part of your deposition in this case?

A. Yes.

Paper marked Exhibit H. C. W. No. 3.

Q. Mr. Wiedeman, I will hand you the original contract, marked Exhibit H. C. W. No. 3, and ask if the date on that contract is August 8th, 1908, as stated in the previous question?

A. The date when made up at our office is August 6th, 1908; it was accepted a few days later, on August 8th, 1908. That is customary for the reason that the contract was accepted when it reached there, being in the mail during that time.

Q. And the date, August 8th, on which it was accepted is the date appearing at the end of the contract?

A. Yes.

Q. Has the original contract been recorded in West Virginia, in the County in which the Sistersville Brewing Company plant is located?

A. Yes.

Q. And on what date?

A. 7th day of December, 1908.

Q. That is the date of recordation, is it not, as shown by the Clerk of the County Court's certificate, endorsed on the back of the original contract?

A. They did, yes.

Q. Can you state when those tanks were delivered at Sistersville—approximately, if you do not know accurately?

A. I think the date is given in the contract. We made delivery in accordance with the contract.

Q. You may look at the contract and see?

A. No, I see that was left blank, but I recollect now that the delivery was to be made immediately, because they were waiting for the tanks. We had the tanks about completed. They were shipped very promptly, I know.

Q. By whom were the tanks installed in the building of the Sistersville Brewing Company, at Sistersville?

A. They were installed by us, under the direction of John McConnell.

Q. Who is John McConnell?

A. He is one of our erection engineers.

Q. Mr. Wiedeman, do you know what payments, if any were made by the Sistersville Brewing Company on the purchase price of the tanks, as provided in that contract?

71 A. There were some payments made, but I am not in a position to state, as I left that part of the transaction over to our Secretary, after the contract had been closed.

Q. Who is your Secretary?

A. Mr. Fisk.

Q. W. L. Fisk?

A. W. L. Fisk.

Q. Where are those tanks, the sale of which is provided in that contract, at this time, if you know?

A. As far as I know they are still in the brewery of the Sistersville Brewing Company.

Q. Mr. Wiedeman, I will ask you whether or not the tanks, the purchase and sale of which is provided for in the original contract between Detroit Steel Cooperage Company, and Sistersville Brewing Company, were manufactured by you expressly for the brewery of the Sistersville Brewing Company, at Sistersville, West Virginia?

A. They were manufactured originally on the order received from Bollinger Bros.

Q. Were the tanks originally manufactured by you for Bollinger Bros., used in the brewery at Sistersville, to fill the contract entered into by you with the Sistersville Brewing Company?

A. We made up the order first, and later we used part of the tanks for other contracts that we had during our busy season. When we got slack we made up those tanks that had been used to fill the original order.

Q. Then these tanks, provided for in the original contract between Detroit Steel Cooperage Company and Sistersville Brewing Company, could be used in any other brewery, could they?

A. Oh, yes.

Q. Are those tanks manufactured complete, at your factory here in Detroit, or are they sent out in sections and set up in sections at the point of delivery?

A. Those were manufactured and completed in the shop, and shipped there in the whole, and put inside the brewery on stands.

Q. What do you mean by "stands"?

A. Legs or supports, so-called. That is all the work necessary to be done at the brewery.

Q. State whether or not those tanks could be removed from the building of the Sistersville Brewing Company, at Sistersville, without injury or damage to the tanks?

A. Very easily, yes.

Q. Could the tanks then be used in any other brewery?

A. Yes.

Q. Are these tanks manufactured by you for the Sistersville Brewing Company, under your contract with them, made or constructed to be connected to or attached to the brewery building?

A. No, they are not attached to the building in any way; simply placed on supports, which stand on the floor; not fastened to the floor in any way.

72 Q. How are they held in place?

A. These supports stand on the floor and the tanks stand on top of them.

Q. What were the sizes of those tanks supplied by you to the Sistersville Brewing Company, with reference to length and diameter? I mean, the dimensions?

A. They were 8 feet, outside diameter, three 3 foot 6 rings. Eleven of them were that size, and two were the same diameter, containing two 3 foot 6 rings.

Q. What do you mean when you say they contained so many 3 foot 6 inch rings?

A. Our tanks are made up in rings, so-called "endless rings," which are made in various sizes. These tanks were made up of three and two rings, respectively; together with bottoms and heads, to make the tank complete, and the usual supports and other fittings.

Q. Then the length or height of these tanks depends on the number of rings used in their construction?

A. That is it.

Q. And a tank with two 3 foot 6 inch rings would be practically 7 feet high?

A. Between heads; not including the supports and the heads.

Q. You may state whether or not, after such tanks have been installed in a brewery, they are ever removed from the brewery building?

A. It has been done, yes.

Q. Have you ever known of its being done?

A. Yes.

Q. You may state, when such tanks are removed from the building, how it is done?

A. By taking out the arch in the wall, simply rolling the tanks out.

Q. What do you mean by taking out the arch in the wall?

A. It is customary to leave an arch in the brick wall leading into the cellar, for that very purpose, or place for removing the tanks.

Q. State whether or not it is customary, and the usual practice in the building of breweries, to have one room set apart in which to place the chip tanks or casks?

A. That is a customary practice.

Q. Is it always done?

A. In most all cases. I have known cases where they combined what they call the chip cask and stock tub cellar in one. In that case they would have stock tubs in the same cellar with chip casks.

Q. But the chip casks are all put in one room together?

A. Yes.

Q. In installing these chip casks or tanks, at what stage of the erection of the brewery building is it usually done at?

A. Installing of the chip casks is usually the last item in completing the brewery.

Q. That is, after the building is erected?

A. After the building is all erected.

Q. How are they taken into the building?

A. Through this opening or arch, as I explained before.

73 Q. Is that arch always left in a brewery building for that purpose?

A. For that purpose, only, yes.

Q. And what is done with the arch after the tanks or casks are installed in the brewery building?

A. The arch is then bricked up.

Q. And what is done, if it ever becomes necessary to remove the tanks from the building?

A. Just remove the arch again.

Q. I believe you stated you have been in the steel cooperage business, in the manufacture of these tanks, since 1902?

A. Yes.

Q. Do you know whether or not the Sistersville Brewing Company has ever paid for these tanks, under its contract with you?

A. No, they have not. They have not paid it. We hold certain notes against them.

Q. I believe you have testified that prior to the contract entered into by De-roit Steel Cooperage Company with the Sistersville Brewing Company, that Detroit Steel Cooperage Company had entered into a contract with Bollinger Bros., for the sale of chip tanks or casks, for the brewery at Sistersville?

A. That is right.

Q. I will ask you what was the date of that contract?

A. August 10th, 1905.

Q. I call your attention to the following clause or condition contained in the contract entered into between the Detroit Steel Cooperage Company, and Sistersville Brewing Company on August 6th and 8th, 1908, and marked Exhibit H. C. W. No. 3, which is as follows:

"It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified, and any notes and acceptances that may be given on account of any such payments, shall have been fully paid; and in case of default in any of said payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures."

and ask you to state whether or not the contract entered into by the

Detroit Steel Cooperage Company with Bollinger Bros., on August 10th, 1905, contained a similar or like clause and condition?

Judge JACOBS: Defendants object to that question and the answer, as immaterial.

A. It contains the same clause exactly.

74 Q. I will ask you to state whether or not the Detroit Steel Cooperage Company entered into any other contracts for the sale and purchase of chip tanks or casks, with Bollinger Bros., besides the one under date August 10th, 1905?

A. Yes, quite a number of them.

Q. How many?

Judge JACOBS: Objected to for the same reason, being immaterial to the issues in this case.

A. There was another contract entered into the same date, August 10th, 1905, and four more contracts later.

Q. Will you please give the dates?

A. One October 19th, 1905, for Canton, Ohio; one June 23rd, 1906, for Conemaugh, Pa.; one May 9th, 1907, for New Bethlehem, Pa.; one June 28th, 1907, for Berwick, Pa.

Q. I will ask you as to whether or not all of these other contracts, enumerated by you as being entered into with Bollinger Bros. for the sale of chip casks or tanks, contained a similar or like condition or clause in relation to reservation of title until payment, as last quoted above?

Judge JACOBS: The question and any answer thereto are both objected to by counsel for the defendants, because immaterial, incompetent and irrelevant on any issue raised by the pleadings in this case.

A. They all contain the same clause.

Q. Mr. Wiedeman, there has been brought in the Circuit Court of the United States for the Northern District of West Virginia, a bill of complaint by George W. Hartman, a citizen of Pennsylvania, and Bollinger Bros., a corporation, and citizen of Pennsylvania, against Sistersville Brewing Company and others; I will ask you as to whether or not the Detroit Steel Cooperage Company had anything to do, whatever, with the filing of this bill?

A. No, we did not.

Q. In October, 1909, a decree of sale of the property of the Sistersville Brewing Company was entered in the above mentioned cause of George W. Hartman and others against the Sistersville Brewing Company; I will ask you as to whether or not the Detroit Steel Cooperage Company, in any way, consented to the entry of this decree of sale?

A. No, we did not.

Q. Was the Detroit Steel Cooperage Company present by officer, counsel or agent in the court when this decree of sale was entered?

A. No, not that I know of.

Q. I will ask you to state whether or not Arlen G. Swiger and

75 Thomas P. Jacobs, who signed the decree of sale, as counsel for all the unsecured creditors, represented the Detroit Steel Cooperage Company?

A. No, they did not represent us.

Mr. KIMBALL: I believe that is all.

Cross-examination.

By Judge JACOBS:

Q. Why is a chip tank so-called, that is, why has it that name?

A. Three or four different classes of tanks used in a brewery, this is one of the four; some of which only use two now.

Q. There are different kinds of tanks necessary to use in a brewery, are there not?

A. Yes, two or three or four different kinds used in some breweries.

Q. The chip tank or cask is absolutely indispensable in a brewery, is it not?

A. No, any kind of pressure tank will answer the same purpose.

Q. For what purpose is the chip tank used?

A. Some of them do not call them chip tanks any more, they call them pressure tanks.

Q. A chip tank and pressure tank is one and the same thing?

A. One and the same thing.

Q. There must be some kind of tank taking the place of that tank to a complete brewery?

A. Yes, any kind of tank that will hold pressure, will answer the purpose.

Q. And beer cannot be completed for market without such a tank, can it?

A. Not until it is put under pressure.

Q. And beer is ripened, so to speak, in the chip tank, or pressure tank, is it not?

A. Not ripened.

Q. Before it is marketed?

A. Not ripened; it is put under pressure there to give it life, so-called. It is ripened by age in the stock tanks.

Q. It is never put on the market except it has first been put in the pressure or chip tank?

A. That is right.

Q. Or some other tank answering to that?

A. As I said before, any tank that will hold pressure.

Q. Were you ever in Sistersville, West Virginia?

A. No, I have never been there personally.

Q. You have not seen, nor inspected the brewery building of the Sistersville Brewing Company, have you?

A. No, not this particular brewery.

Q. You say that the tank is placed in the building on stems?

A. On stands.

Q. Stands?

A. Yes, stands.

76 Q. Of what material are those stands made?

A. Cast iron.

Q. And they are placed on the floor, and the tank is placed on these stands?

A. That is right.

Q. How many stands are used?

A. About eight stands for each tank, of that diameter.

Q. About eight stands?

A. Yes.

Q. Those stands, you say, are made of cast iron?

A. Yes, the bottom piece. There is what they call a locknut on top—an adjusting nut. That is wrought iron, of course; but the stand itself is cast iron.

Q. Is that wrought nut, or stand, in any way fastened to the tank?

A. No, it is just adjusted. These stands are adjustable up and down.

Q. Those nuts are for the purpose of levelling it?

A. They are just slipped into the stand, and these nuts are for the purpose of levelling it, and give it a little pitch, so as to drain.

Q. How is the beer put into that chip tank?

A. Through bottom or top connection. I don't know which they use there. They use the top or bottom connection. They can use either one.

Q. And of course, the tank has a head to it at the top, as well as the bottom?

A. Yes.

Q. And the chip tank must stand a certain amount of pressure?

A. Just about 15 pounds.

Q. Fifteen pounds to the square inch?

A. As a rule, yes.

Q. From what vessel or reservoir is beer drawn, that goes into the chip tank?

A. Usually from the stock tubs. At times they take it from the fermenting tanks.

Q. Where are the stock tubs, or fermenting tanks located?

A. Where they are placed in this particular brewery, I do not know, but usually on the second floor.

Q. In this particular brewery you are not informed?

A. No, I have not looked it over closely.

Q. You do not know whether or not there was any arch in this building, do you?

A. I have never seen it personally. I only know from reports that I received from our erection engineer.

Q. And personally, you do not know whether those tanks were put in before the wall so built, was complete or not?

A. No, only from reports that we received from our engineers.

Q. Now, if the beer from the stock or fermenting tanks is drawn into the chip tank, what is the method of drawing it, or running it into the chip tank?

A. As I said before, there is a connection on top. Some times

77 they attach a hose to the top connection, and sometimes to the bottom connection, and sometimes it is forced in from the bottom. It has a hose coupling which is secured on to this fitting, which is attached to the tank, a fitting which we furnish.

Q. Sometimes, you say, that is forced in from the bottom, and sometimes from the top?

A. Sometimes from the top.

Q. That hose fitting, how is that fastened on to the chip tank, and into the other tanks?

A. That hose—so-called hose coupling, screws right over on the fitting that we furnish with our tank.

Q. You furnish a fitting over the tank?

A. Yes.

Q. And that hose is screwed on to that, and connects with the—

A. (Interrupting.) Top fitting or bottom fitting.

Q. And that conducts the beer,—

A. (Interrupting.) Into the tanks.

Q. Into the tank from the other tank or tanks?

A. That is right.

Q. Is there any pressure on the other tanks?

A. On the stock tanks, no.

Q. Or from any tanks?

A. No.

Q. No pressure on them?

A. No.

Q. And are they made of the same material as the chip tanks are made of?

A. Yes, the same material.

Q. The power to resist pressure does not depend, however, on the material of which the tanks is made?

A. As we use the same material for the stock tubs as we do for chip tanks, anybody that has our tanks in use, they can use the stock tubs for chip casks any time they want to.

Q. Use the stock tubs?

A. Yes.

Q. Where are the chip tanks usually placed?

A. In the lower cellar.

Q. From what tank is the beer drawn for market—for shipment?

A. From the chip tanks.

Q. And how is that drawn?

A. By means of a hose connection.

Q. The same connection through which the beer is forced into the chip tank?

A. Well, that is always taken from the bottom connection.

Q. Whether it goes in at the top or bottom connection, it is taken out at the bottom connection?

A. Yes, always taken out at the bottom.

Q. You made your contract, which you exhibited here, with the Sistersville Brewing Company direct, did you?

A. Yes, with the Secretary, Dr. Kirk.

Q. Speaking of the connection with Bollinger Bros., you say that contract was cancelled?

A. The first one we had with Bollinger?

Q. Yes.

A. Yes.

78 Q. And you took the matter up, then, direct with the Sistersville Brewing Company, and made the tanks in pursuance of the contract, which you exhibited, and shipped and furnished the tanks in pursuance of that contract?

A. No, we had no negotiations with the Sistersville Brewing Company, other than that one letter, which was received after the negotiations had been completed by Bollinger Bros.

Q. Bollinger Bros. had given the matter up, and had referred you to the Sistersville Brewing Company, through Mr. Kirk?

A. They had arranged the matter in such a shape that it was ready for us to accept.

Q. Then the contract or arrangement—the original agreement with Bollinger Bros. from that time was cancelled?

A. Yes.

Q. And you look wholly and solely to the Sistersville Brewing Company for the payment for these tanks?

A. Under the terms of our contract.

Q. Yes, under the terms of your contract. This contract that you have exhibited today, as No. 3, is the contract under which the tanks were furnished, is it?

A. Yes.

Q. Did you, Mr. Wiedeman, receive a letter from Bollinger Bros., addressed to Detroit Steel Cooperage Company, dated July 22nd, 1908?

A. I cannot say that without going through my files; perhaps we did.

Judge JACOBS: I will save Mr. Wiedeman the trouble of looking it up, and maybe I can use a copy.

Mr. KIMBALL: Show it to him, Judge, and if he can remember it, go ahead.

(Letter shown to witness.)

A. Yes, I remember this letter.

Q. If you have the letter, will you please file the same with your deposition, to be marked Exhibit 4 on cross examination.

A. I have the original letter. Yes, I will file that.

Paper marked "Def't's Exhibit No. 4."

Q. That letter speaks, or rather, advises you to attach sight draft for \$2,000 to "BL."

A. Bill of lading.

Q. With instructions to deliver to Sistersville Brewing Company, when draft is paid, and send through your bank to Sistersville for collection; did you do so?

A. That arrangement was not carried out.

Q. It was not carried out. Was the \$2,000 paid?

A. I don't remember whether they paid all of that or not.
79 Q. You said, however, you did not know about it?

A. I did not know how much was paid.

Q. State whether or not you recollect of writing to Bollinger Bros., under date July 23rd, 1908?

A. Yes, I remember writing this letter, in reply to theirs.

Q. Do you remember of Bollinger Bros. writing to the Detroit Steel Cooperage Company on the date, July 25th, 1908, and do you have the original letter? If so, will you file the same, as Exhibit No. 5, to your cross examination?

A. Yes, I have the original letter, and I will file it.

Paper marked "Def't's Exhibit No. 5."

Q. State whether on the 27th day of July, 1908, you wrote to Bollinger Bros. a letter in connection with this cooperage matter?

A. Yes, I remember writing that letter.

Q. State also whether on the 3rd day of August, 1908, you addressed a letter to Bollinger Bros. at Pittsburg, Pa.?

A. Yes, I remember writing this letter.

Q. Have you the letter addressed to your company by Bollinger Bros., under date August 4th, 1908, and if you have, will you produce the same and file it as Exhibit No. 6 to your deposition?

A. Yes, I have the letter, and will file the same.

Letter marked "Def't's Exhibit 6."

Q. Mr. Wiedeman, at the time you furnished these tanks to the Sistersville Brewing Company, you knew that there was a bond issue, made by the Sistersville Brewing Company, secured by a mortgage, which was duly recorded in the office of the clerk of the county court of Tyler County, West Va., did you?

A. I knew of some bonds being issued, on account of the letter I received from Bollinger Bros., but I had no other information. I never inquired about it.

Q. You learned of the fact of a bond issue through Bollinger Bros.?

A. Through the letter received from them.

Q. You made no further inquiry about the bond issue?

A. No, I did not.

Q. You made no inquiry as to whether there was any mortgage securing the bond issue?

A. I supposed there was. Where there is a bond issue, I took it for granted there was a mortgage on there, but when we sell on a conditional contract, we do not let the mortgage stand in the way.

Q. Speaking of conditional contract, you are now referring to the contract which you have, this morning, exhibited, and in which contract you profess to retain the title to the property sold?

A. Yes.

80 Q. You supposed, there being a bond issue, there must necessarily be a mortgage to make it good?

A. Yes.

Q. Notwithstanding that fact, and notwithstanding the letters you

received from Bollinger Bros., you concluded to take the risk of making delivery of the goods—of the property?

A. I did, with the understanding that the title to the tanks was to remain in us until these notes were all paid.

Q. There is no other understanding, is there, except the one contained in the contract, which you have exhibited to-day?

A. I expect to stand on the terms of the contract and conditions.

Q. And there is no other contract or memorandum, or writing, except that?

A. No, that is all.

Judge JACOBS: I believe that is all, sir.

Redirect examination.

By Mr. KIMBALL:

Q. How long have steel enamelled tanks been used for the purpose of chip tanks, in breweries?

A. Why, we have been making them now since 1902; and there was another concern named the Fowler Company making them some years prior to that, but they were not used as chip casks, but for what they called a vacuum system—vacuum fermentation system.

Q. Are you the only firm manufacturing steel enamel tanks for chip tanks?

A. No, the Fowler Company of Rochester, they manufacture them also, now.

Q. How long have steel enamel tanks been manufactured for this purpose, if you know?

A. For this particular, so-called chip cask purpose, I only know of a few years prior to the time we started to make them.

Q. In 1902?

A. Yes.

Q. What was used for these purposes before they began to make the steel enamel casks or tanks?

A. Wooden casks, or casks made out of common steel.

Q. Are wooden casks or tanks used in any breweries at this time, for these purposes?

A. Oh, yes, a great many of them.

Q. You stated on cross examination that the chip tanks were usually placed in the lower or bottom cellar; what do you mean by the "lower or bottom cellar"?

A. These cellars are usually two or three stories high, and the place for the chip tanks are usually erected on the lower floor—in fact, always, as far as I know.

81 Q. By using the word "cellar," do you mean to be understood that the floor on which the chip tanks are used—are placed, is below the surface of the ground?

A. No, not as a rule now. The breweries that are built now, the cellars usually are—what we call the lower chip cask cellar, is usually even with the ground.

Q. What we otherwise call, in an ordinary building, the ground floor?

A. Yes.

Q. You stated that in using the chip tanks, and filling them or emptying them, a hose was connected to the tank; is that a temporary connection, or a permanent connection?

A. A temporary connection used for filling or emptying the tanks.

Q. Are the tanks connected up by hose with other tanks in the building at any other time, except when they are being filled or emptied?

A. Only when they are being filled. When they are filled, connection is taken off again, and put on again when they are emptied.

Q. What sort of a utensil or implement is this hose that you speak of?

A. It is ordinary rubber hose, usually one and a half inch diameter.

Q. When it is attached to the chip tank, it is screwed on to a vent or faucet?

A. Screwed on to the faucet which is attached to the tank, which faucet is usually furnished by us with the tank.

Q. Have the tanks known as stock tanks, or fermenting tanks, tops?

A. Stock tanks have.

Q. How about the fermenting tanks?

A. They make some now where the fermenting tanks have tops too; but most of them are open tanks.

Q. I believe you say the beer is run from the stock tank into the chip tank?

A. Yes, that is right.

Q. And usually the stock tank is on the floor above the room, or floor, on which the chip tanks are placed?

A. Yes, as a general rule.

Q. Then when the beer is run from the stock tank into the chip tank, ordinary rubber hose is used, screwed on to the stock tank and screwed on to the chip tank?

A. That is right.

Q. And the beer runs from one to the other?

A. The beer runs from one to the other.

Q. I believe you said the chip tanks were adjustable on the legs or stands; what do you mean by that?

A. We got a nut which can be either screwed up or down, so as to level the tank. The floor is usually uneven, and we use this mean to level the tank properly.

Q. Are the chip tanks attached to, or physically connected with the stand?

A. No, they just set on it. The nut is really part of the stand which can be adjusted one way or the other to level the tank.

Q. Do I understand you to mean to say that the tank can be raised or lowered, slipped up and down in these stands?

A. Well, by screwing this nut up, it naturally raises up the tank, and vice versa, by screwing it down, you lower it.

Q. In answer to a question on cross examination you spoke of a contract with Bollinger Bros., as having been cancelled; which con-

tract do you mean, the one that was entered into with Bollinger Bros. in 1905, or the contract that Bollinger Bros. negotiated for Sistersville Brewing Company in 1908?

A. I mean the one entered into with Bollinger Bros. in 1905.

Q. That was the first contract?

A. The first contract.

Q. I will ask you if the price of the tanks is mentioned in the letter of Bollinger Bros. under date July 25th, 1908, as being \$5,480, was the same price as mentioned and provided for in the contract entered into between Detroit Steel Cooperage Company and Sistersville Brewing Company?

A. Yes, it was.

Q. What was the date of the letter of Bollinger Bros. informing you of the bond issue, or that they held some bonds, or in which bonds were mentioned?

A. June 27th, 1908.

Mr. KIMBALL: I believe that is all.

Recross-examination.

By Judge JACOBS:

Q. Mr. Wiedeman, when you spoke, formerly, of a contract between Bollinger Bros. and you, being cancelled, I meant to ask you whether you still held Bollinger Bros. liable on that contract?

A. Why, we did not after we entered into this contract with the Sistersville Brewing Company.

Q. Then, after the contract was taken up and executed between your company and the Sistersville Brewing Company, that ended the liability between the Bollinger Bros. and you?

A. Yes, after this contract was signed we released Bollinger Bros. on the original contract.

Q. The original contract was made in 1905 you say?

A. 1905.

Q. And this present contract, which was exhibited in your evidence this morning bears the correct date, does it?

A. Yes.

Judge JACOBS: That is all.

83 Redirect examination.

By Mr. KIMBALL:

Q. The contract of August 6th and 8th, 1908, as entered into by Detroit Steel Cooperage Company with Sistersville Brewing Company, and negotiated by Bollinger Bros. was entered into to take the place of the contract entered into with Bollinger Bros. in 1905, was it?

A. Yes.

Mr. KIMBALL: I guess that is all I want to ask.

Judge JACOBS: That is all.

JOHN MCCONNELL, a witness of lawful age, being produced on behalf of the plaintiff and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Charles N. Kimball, counsel for plaintiff, as follows:

Q. State your name, age and residence?

A. John McConnell, 48, 1173 Concord avenue, Detroit, Mich.

Q. What is your occupation or profession?

A. I erect steel tanks for the Detroit Steel Cooperage Company.

Q. How long have you been erecting tanks for the Detroit Steel Cooperage Company?

A. About eight years.

Q. What do you mean by erecting tanks?

A. Well, we call it erecting. When the tanks are shipped from the shop, we go to the brewery or place where they are sent, and set them up in the buildings.

Q. That is the chip tanks and casks that are manufactured by the Detroit Steel Cooperage Company?

A. Yes, sir.

Q. Were you working for the Detroit Steel Cooperage Company in the year 1908?

A. Yes, sir.

Q. State whether or not you made a trip to Sistersville, West Virginia, to set up tanks in the brewery of the Sistersville Brewing Company at that place?

A. Yes, sir.

Q. Can you give the date at which you went to Sistersville and set up the tanks there?

A. I went to work on August 20, 1908.

Q. How long were you there setting up the tanks?

A. Just about two weeks, I think.

Q. State what condition the brewery of the Sistersville Brewing Company was in with reference to the stage of the work on the building, when you went to Sistersville?

A. The building was completed, all but the opening left for us to put the tanks in.

84 Q. What do you mean by the opening?

A. There was an arch left in the end of the building.

Q. In what room?

A. In the chip cellar.

Q. What floor?

A. The ground floor, or in this case, it was about four feet below the floor. The cellar goes down a little.

Q. What was the size of that arch that was left open for you to take the tanks in?

A. I think 10 by 10 about.

Q. Do you remember how many tanks you erected in the Sistersville brewery?

A. I would not be sure about it, but I think 13.

Q. What work do you do? What is necessary to erect or set up one of those tanks?

A. Well, just put it in, and set it up on the stands.

Q. State whether or not the tanks are completed when they are received at the brewery where they are to be set up?

A. In this case they were completed.

Q. What is necessary in installing them by the engineer?

A. Well, they have to be put in and set up on the stands, and fittings and doors and manhole doors and everything of that kind put on and tested.

Q. Were the tanks set up and erected by you in the brewery of the Sistersville Brewing Company connected up in any way, or attached to the building or brewery itself?

A. No, sir.

Q. Are the tanks or casks set up and erected by you ever attached or connected up in any way to the brewery building in which they are erected?

A. No, sir.

Q. How are they held in place?

A. They are set on stands and held by their own weight on the stands, that is all.

Q. Are the stands screwed or cemented in the floor in any way?

A. No, sir.

Q. Fastened to the floor in any way at all?

A. No, sir.

Q. In your work connected with the business of erecting tanks, have you ever had occasion to remove tanks after they had already been set up in breweries?

A. Yes, sir.

Q. How is it done in cases where it becomes necessary to remove the tank from the brewery building?

A. Then the arch is taken out again where they go in.

Q. What do you mean by the arch?

A. I mean the arch that is left, the place that is left in the end, of each cellar, for the purpose of putting in these tanks, or taking them out.

Q. Are brewery buildings always built with an arch in, for the purpose of taking in or taking out tanks?

A. Yes.

Q. State whether or not the tanks and casks erected and set up by you in the building of the Sistersville Brewing Company were set up and erected by you in the customary and usual way?

A. Yes, they was.

85 Q. Do you know the purpose for which the chip tubs or casks are used?

A. Well, I know just from what I have heard, but the brewery business, I don't know anything about it at all.

Q. Who helped you erect and set up those tanks in the Sistersville Brewing Company's building?

A. Do you want the names of the men?

Q. Yes, if you can give them.

A. Charles London, J. Brown, and two men from Detroit, Louis George and Arthur Schaum.

Q. Do London and J. Brown live in Detroit?

A. No.

Q. Where do they live, if you know?

A. At Sistersville, but I could not tell where. I just hired them there.

Q. They were local men?

A. They was local men there.

Q. Louis George and Arthur Schaum you then took with you from Detroit to Sistersville?

A. Yes.

Q. Do you know where they are now?

A. No, I do not.

Q. Are they working for the Detroit Steel Cooperage Co.?

A. No, sir.

Q. Is it possible to remove the chip tanks or casks from the building or brewery of the Sistersville Brewing Company at Sistersville, without injury to the chip casks or tanks?

A. Yes, sir.

Q. Would any injury result to the building from removing them?

A. No, sir.

Q. Have you ever had occasion to remove chip casks or tanks from brewery buildings in which they had been erected?

A. Yes, sir.

Q. On what occasions—how many times?

A. Never but once.

Q. Were they removed that time without injury to the casks or tanks?

A. Yes, sir.

Q. And without injury to the building?

A. Yes, sir.

Q. Do you know how the chip casks or tanks are connected up with any other part of the brewery building when they are in use?

A. Connected with hose.

Q. What do you mean by hose?

A. I mean rubber tube—common rubber.

Q. An ordinary rubber hose?

A. Yes.

Q. Of what diameter do you know?

A. Inch and a half or two inches.

Q. Do you know to what other part of the brewery buildings appliances the chip casks or tanks are connected up with the hose when they are used?

A. Well, when they are used, when they are filling them, the hose might be coming down through the floor from above, from
86 the stock tub, or if they are emptying them, the hose would run to the racking off machine where they fill the barrels.

Mr. KIMBALL: I believe that is all.

Cross-examination.

By Judge JACOBS:

Q. How many chip tanks did you say you erected?

A. I don't know, I am sure; I think I said 13, but I am not sure about it.

Q. These, on what floor were they erected?

A. On what we would call the ground floor.

Q. The first floor?

A. Yes, sir.

Q. It is not possible to manufacture beer without chip tanks, is it?

A. Well, as far as I know, it is not; but I don't know anything about the brewery business. I know that they have chip tanks.

Q. In other words, if those chip tanks were taken out, it would be necessary to put in others, to manufacture beer?

A. I suppose so, I could not say for that, I don't know, or understand anything about the brewery business at all. I don't know that part of it.

Q. Were those chip tanks all of the same size, or different sizes?

A. I think there was two smaller, but the size I don't remember.

Q. How long were you putting the tanks in place?

A. I think about two weeks. I think I left about September 1st. I came home September 1st, somewhere about ten days or two weeks.

Q. And you had four or five men helping you?

A. Yes, sir.

Q. During the whole of that two weeks?

A. No, not all the time for that two weeks, but I had four men for five days, and then I kept my own two men that I took from here to finish the work, after we got them inside.

Q. Now, it would be necessary to take down the wall to take out those tanks?

A. Yes, sir.

Q. That is a brick wall, is it not?

A. Yes.

Q. And about two feet thick, is it not?

A. Yes, sir, I should think it would be about two feet thick.

Q. Those bricks are laid in cement, are they not?

A. Cement or mortar, I don't know.

Q. Did you build the wall?

A. No, sir.

Q. Your work was done when you put in the tanks?

A. Yes, sir.

87 Q. And you did not remain to see the wall completed?

A. I think the wall was completed before I left there.

Q. Before you left?

A. Yes.

Q. You tested all the tanks, did you?

A. Yes.

Q. After you placed them in?

A. Yes, sir.

Q. I understand you to say that beer cannot be manufactured and ready for market without chip tanks?

A. Not as I understand it. I don't understand that it can; I think they must have chip tanks, or pressure tanks.

Judge JACOBS: That is all, I guess.

Redirect examination.

By Mr. KIMBALL:

Q. I do not think I asked you. Who sent you to Sistersville, or whom did you go for to Sistersville, to erect these chip tanks in the brewery there?

A. The Detroit Steel Cooperage Company.

Q. Was the arch or opening through which you took these tanks or casks into the brewery building, the same sort of an opening that is left in all breweries in which you have erected tanks or casks?

A. Yes, practically the same.

Q. And was filled up in the same manner?

A. Yes, sir.

Q. How much does one of those tanks or casks weigh, if you know?

A. Well, I should think that these weighed about three and a half tons, three tons—between three and three *three* and a half tons, each one.

Q. What means did you use to get them into the building?

A. We used what we call a chain fall on the inside of the building, and a line to ease them down from the outside.

Q. Did you roll them in, or lift them in, or put them in end over end; how did you do it?

A. We skidded them right in lengthwise. They could not roll into that opening. They have to go in end ways.

Q. Is there any reason why the chip cask or tank room is always put on the ground floor of a brewery building?

A. No, I don't know; I could not tell that, I don't know why it is. I know it is always there, but why, I do not understand.

Q. Could these tanks which you set up in the brewery of the Sistersville Brewing Company at Sistersville, be used or utilized in any other brewery in which tanks were required?

A. Yes, sir.

Mr. KIMBALL: I believe that is all.

Judge JACOBS: That is all.

An adjournment was then taken to 2 P. M.

FRANK J. HUETTEMAN, a witness of lawful age, being produced on behalf of the plaintiff and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Charles N. Kimball, counsel for plaintiff, as follows:

Q. You may state your name, age and residence?

A. Frank J. Huetteman, age 36 years old, residence Detroit, Michigan.

Q. What is your business?

A. I am Secretary and Treasurer of Huetteman & Cramer Co.

Q. What business is the Huetteman & Cramer Company in?

A. Principally, that is at the present time, builders of refrigerating and ice making machinery. In the past the most of our work has been the erection of breweries—erection and equipping of breweries.

Q. How much experience have you had in the erection and equipping of breweries?

A. We got into that business about 25 years ago, and have been at it—well, we are at it today, and been at it right along.

Q. Have you erected any breweries in West Virginia?

A. Yes, our firm built two there that I distinctly know of.

Q. What were those?

A. The Unceda Brewing Company, and the Benwood Brewing Company at Wheeling.

Q. From your statement of building and equipping breweries, do I understand you to mean that you contract for the work, or that you draw the plans?

A. We draw the plans and contract for the complete brewery, and build the machinery—manufacture the machinery and install it.

Q. In planning and building breweries, what is the custom with reference to locating the room known as the chip tank or cask room, on which floor, or what part of the brewery?

A. The chip cellar, what is termed and commonly known as the chip cellar is the lowermost floor in the building.

Q. Do you mean by that a room below the surface of the ground?

A. No.

Q. On a level with the surface of the ground?

A. Usually on a level with the surface of the ground.

Q. Is there any particular reason for locating it on the ground floor?

A. It is the most convenient place to put it, to facilitate the process of making beer. By locating it on the ground floor, you take advantage of the gravity system of conveying your beer from one stage of its process of manufacture to another.

Q. What provision, if any, do you make, in preparing the plans for the brewery building, for the admission and setting
89 up of the chip casks or tanks, in the chip cask or tank room?

A. When made of wood, no particular provision has to be made. If made of steel, an opening must be provided for so that they can be got into the building, because the building is usually completed before the tanks are on the ground.

Q. By that answer, do I understand you to mean, when the brewery is built of wood, or when the chip casks or tanks are built of wood, that no opening is necessary?

A. I mean when the chip casks are made of wood, no opening is necessary.

Q. When the chip casks or tanks to be installed in a brewery build-

ing are of steel, do you make any provision in planning and building a brewery for their admission; if so, what?

A. In making our plans for accommodating chip casks made of steel, our architects show an opening at a convenient wall leading into the chip cellar. This opening the contractor has instructions to leave undone, that is to say, he leaves the brick out, and in order to support the wall above he constructs an arch. That opening must be large enough to admit the largest part of the chip casks that go into this room.

Q. Do you provide for that arch in your plans?

A. Always.

Q. Why do you cause an opening to be made in the way of an arch?

A. It would be the only convenient and proper way of providing an opening that could be easily closed up, after the tanks are in, without injuring the building to any extent.

Q. Do you make any provision for closing the arch after the tanks are installed, and, if so, what?

A. That opening is bricked up by the contractor, in the same manner that any other opening left in a brick wall is closed, excepting that the bricks are not joined with the rest of the wall, and not interlocked.

Q. Do you provide in your plans and specifications for the manner of filling the opening up, or arch?

A. The plans show the arch closed up, and give an outline of the opening, the dimensions, what they should be; and the specifications state that the contractor has to close this up after the tanks have been put in place, or put into the room.

Q. Is it customary or usual to leave any opening in the way of a window or door in the arch when it is closed up?

A. The customer can suit himself as to that. If he wants day light in his cellar, we will provide for a window in that arch. If he wants to use artificial lights in the cellar, we close the arch up entirely. I think that I have more frequently seen these arches—these openings with windows in afterwards, than without.

90 Q. Is there any reason for closing the opening up under the arch by brick-work—any more reason for that than closing it up in any other way; if so, what?

A. If the brewery building is all brick, the opening is closed up with brick, in order to conform with the rest of the building, and it must be equivalent as the rest of the walls are, to prevent leakage of heat into the room. These brewery cellars are refrigerated after the plant is in service.

Q. One reason for filling up the opening with brick, would be to keep an even temperature in the chip cask room?

A. Exactly.

Q. Is the chip cask or tank room refrigerated?

A. Oh, yes.

Q. Kept much cooler than the other parts?

A. Yes, a lower temperature is usually required in the chip cellar than elsewhere.

Q. By providing for an opening under the arch in the wall, which is later walled up with brick, can the brick which fills up the opening under the arch be again removed without any injury or damage to the building or wall?

A. Yes, if the contractor builds in accordance with the plans and specifications we make, the bricks can be removed without injury to the rest of the building or the wall.

Q. What experience would be necessary in a workman who removed the bricks which filled the opening under the arch in the wall of a brewery; would any special experience be necessary or not?

A. Any one with ordinary intelligence could open the wall, after it had been bricked up into an arch. He would begin at the top and work his way down.

Q. If I understand you correctly, any person who had learned and practiced the trade of brick laying could do that?

A. He would not necessarily need to be an experienced brick mason, no.

Q. It would be a very simple matter?

A. A very simple matter.

Q. How large an opening is usually provided?

A. Depends entirely on the size of the tanks that are going into the room.

Q. Assuming that the opening under the arch in the wall of the brewery building was 10 feet by 10 feet, could you form any estimate of the cost or expense of removing the bricks used in filling the opening and replacing them again?

A. I should think that could be done at a cost not to exceed \$15.

Q. On what do you base your estimate?

A. That is, for the labor only.

Q. What other expenses would there be, besides the labor?

A. A man would have to provide fresh mortar when he closed the wall up again, and perhaps some additional brick.

Q. What do you base your estimate on?

A. I should say an ordinary laborer can take that wall down in half a day, allowing him \$2 a day, would be \$1. A brick mason could close that opening up again in, I should judge two days. If he got \$4 a day, that would be \$8. He would have to have a helper with him. A helper would get \$2 a day. That would be \$4 more—\$13. Possibly another man would have to work a day to clean the old brick off preparatory to putting them back in place again, cleaning the mortar off the brick that was taken out of the arch—\$15.

Mr. KIMBALL: I believe that is all.

Judge JACOBS: The defendants object and except to the foregoing deposition, and to each question and answer, because the same is immaterial, incompetent and irrelevant, and therefore decline to cross-examine.

HUGO BLOQUELLE, a witness of lawful age, being produced on behalf of the plaintiff and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Charles N. Kimball, counsel for plaintiff, as follows:

Q. You may state your name, age and residence?

A. Hugo Bloquelle, 50 years old, residence at 225 Second avenue, Detroit, Michigan.

Q. What is your business or profession?

A. Architect.

Q. You may state whether or not, as an architect, you have had occasion to draw plans for brewery buildings, or buildings used in the process of manufacturing beer?

A. I have.

Q. How long have you been following the business of architect?

A. Since 1887.

Q. Do you practice your profession alone, or are you with some firm?

A. I am with a firm now, at present.

Q. Had you any experience in architecture, or the building of brewery buildings prior to 1887?

Q. Well, I was then in an office, as draughtsman, 9 years before that.

Q. As an architect, have you had occasion to plan and build many brewery buildings?

A. I have.

Q. How many would you say?

A. Oh, probably worked on a dozen or more.

Q. In planning a brewery building, you may state on what floor, or in what part of a brewery building you usually plan to locate the chip cask or tank room?

A. Generally on the lower floor.

Q. On the "lower floor;" do you mean by that the ground floor—what is ordinarily known as the ground floor?

A. Yes.

92 Q. State whether or not in planning a brewery and the construction of it, any provision is made in the plans for admitting or taking in the chip casks or tanks, and if so, what?

A. There is a provision made by building an arched opening, large enough to admit the tanks, and this is sometimes closed up; if the tanks are not just put in at the time, that this brick work can be later on removed so as to form an opening to get them through, and then bricked up again.

Q. In what room, or in what part of the brewery building is that arched opening left?

A. Why, it is generally put in the outside wall.

Q. In what position in the brewery, with reference to the chip tank or cask room is that arched opening left?

A. Why it is, as I stated, the outside wall. When they bring them on, on the big trucks, give them a chance to get up near the wall, and then slide them down through that opening.

Q. Where is the opening with reference to the chip tank or cask room?

A. In the outside wall, that is, if I understand—I don't know whether I catch your idea?

Q. I am asking you how is the opening in the brewery located in the brewery building with reference to the chip cask room; in what part of the brewery is the opening left?

A. Generally in that room.

Q. What do you mean by "that room"?

A. The chip cask room.

Q. Then, I understand that it is not usual to place the chip casks or tanks in the brewery building until after the brewery is practically erected?

A. Generally so.

Q. After the tanks are placed in the chip cask or tank room, what is usually done with the opening through which the tanks have been introduced into the building?

A. It is bricked up again.

Q. Can the opening be closed in any other manner except by bricks?

A. Oh, I presume it could, by using tile.

Q. When such an opening is bricked up, can the bricks be taken out of the arched opening again without damage or injury to the brewery building?

A. Yes, sir.

Q. Does it require any special practice or knowledge to take out the bricks from the arched opening?

A. None whatever.

Q. Assuming that such an opening was left in a brick wall 10 feet by 10 feet, and bricked up, could you form any estimate of the cost or expense of taking the brick out of the arched opening?

A. Ten feet by ten feet?

Q. Yes, sir.

A. Oh, I should judge about—probably \$15 to \$20.

Q. On what do you base that estimate?

A. On the ordinary price of labor and material—labor principally. There is not much material in consideration.

93 Q. You may state whether or not the bricks which were used to close up the arched opening are interlocked with the wall in the brewery building?

A. No, sir, *that* are not. It is a straight jamb building, on each side of the opening, and the brick put in later on.

Mr. KIMBALL: That is all.

Judge JACONS: Defendants except and object to the foregoing deposition, because the same is immaterial, incompetent and irrelevant, and therefore decline to cross examine.

WARREN L. FISK, a witness of lawful age, being produced on behalf of the plaintiff and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Charles N. Kimball, counsel for plaintiff, as follows:

Q. You may state your name, age and residence?

A. Warren L. Fisk, age 40; residence 548 Brush street, Detroit, Michigan.

Q. What is your business, Mr. Fisk?

A. Secretary of the Detroit Steel Cooperage Company—Secretary and Assistant Treasurer.

Q. How long have you held this position with the Detroit Steel Cooperage Company?

A. Since May 1st, 1908.

Q. As Secretary and Treasurer of the Detroit Steel Cooperage Company, have you any knowledge of the contract entered into between the Detroit Steel Cooperage Company and the Sistersville Brewing Company for the installation of certain chip casks or tanks in the brewery building of the Sistersville Brewing Company, at Sistersville, West Virginia?

A. I have.

Q. Did you have anything to do with the negotiating or closing of that contract?

A. Well, not directly, no, any more than I believe that I did send the proposal on to the Secretary of the Brewing Company for his signature.

Q. Do you remember that gentleman's name?

A. Dr. Kirk.

Q. Where does he reside?

A. He was then residing at Pittsburg.

Q. Pennsylvania?

A. Yes.

Q. I here hand you paper marked "Proposal from Detroit Steel Cooperage Company, Detroit, Mich., to Sistersville Brewing Company," and marked for identification Exhibit H. C. W. No. 3, and ask you if that is the original contract?

A. It is, to the best of my knowledge and belief.

94 Q. You may state, if you know, whether the chip casks or tanks contracted for in that instrument were delivered by the Detroit Steel Cooperage Company to the Sistersville Brewing Company?

A. They were.

Q. This contract provides as the price of 13 tanks the sum of \$5,480; you may state how much, if any, of that purchase price has been paid to the Detroit Steel Cooperage Company by the Sistersville Brewing Company?

A. One thousand dollars.

Q. Then, how much remains unpaid on that contract?

A. \$4,480.

Q. How is that indebtedness evidenced?

A. By notes of the Sistersville Brewing Company held by our company.

Q. Have you those original notes?

A. I have.

Q. Will you produce them please. (Two notes produced.) You may state the number of the notes, for what amounts drawn, the dates of the notes, and the date of maturity of each, and the interest date, if any.

A. Two; the amounts, one \$2,000, and the other \$2,531.15; both dated December 1st, 1908; ninety days from date, and the interest at 6%.

Q. You may state whether or not those notes are due and unpaid?

A. They are.

Q. Are there any credits or payments which should be applied to the payment of these notes?

A. No, there is not.

Q. You may state whether or not any part of either of those notes has been paid?

A. It has not.

Q. You may state by whom those notes are signed?

A. Signed by the Sistersville Brewing Company, per W. H. Kirk, Secretary and J. J. Rectenwald, President.

Q. And to whom are they payable?

A. To Detroit Steel Cooperage Company.

Q. Will you file those notes with and as a part of your deposition in this case?

A. I will.

Notes marked respectively "Ex. No. 1 W. L. Fisk" and "Ex. No. 2, W. L. Fisk."

It is hereby stipulated between counsel that copies of above exhibits may be attached to these depositions, instead of the originals, which latter will be produced at the trial.

Q. Do you know where these 13 chip casks or tanks, contracted for in the contract between the Detroit Steel Cooperage Company and Sistersville Brewing Company, filed as Exhibit H. C. W. No. 3, have been or are, since they were delivered to the Sistersville Brewing Company?

A. You mean where are they located at the present time?

Q. Yes.

A. In the plant of the Sistersville Brewing Company, as far as I know.

95 Q. The Detroit Steel Cooperage Company have never taken them back, or taken possession of them?

A. No.

Q. How long have you been in the steel cask or tank business?

A. About three and a half years.

Q. You may state how, or in what manner the casks or tanks are installed or placed in a brewery building?

A. Well, do you mean the method of setting them up?

A. Yes, sir.

A. Usually taken into the building and set up on floor stands, as we call them.

Q. Is there any means of physical connection or attachment between the tanks and the building in which they are located?

A. There is not.

Q. How are the tanks used in the brewery?

A. For various purposes, handling the beer in different stages—you refer to the chip cask particularly?

Q. Yes, I refer to chip casks or tanks especially, how are they used?

A. Well, I don't know much about the technical features of brewing, but as I understand it, the beer is stored in these—they are placed in these chip casks, and put under pressure for the purpose of giving life to the beer.

Q. How is the beer gotten into those chip casks or tanks, if you know?

A. It is pumped in, or run in through rubber hose.

Q. How is the rubber hose attached to the chip cask or tank?

A. By means of hose coupling, that screws on to the faucet of a tank.

Q. Is that the manner in which the tanks put in the Sistersville Brewing Company are constructed?

A. So far as I know.

Q. Is the hose attachment a permanent attachment, or a temporary one?

A. Temporary.

Q. Is a chip cask or tank absolutely necessary to the complete equipment of a brewery?

A. Well, do you refer to a tank for the purpose of containing chips?

Q. I mean a chip cask or tank?

A. Chip cask—I should say that a chip cask, or something else that would answer the same purpose, is.

Q. Then, a chip cask, or something to answer the same purpose is necessary. What would be used, if you did not use a chip cask or tank?

A. I don't know enough of the technical features of brewing to answer that intelligently. I know that there are various systems of handling beer in use, and I know that certain brewers use no chips at all in their beer.

Q. I here show you a letter, dated Pittsburg, Pa., June 27, 1908, addressed to Detroit Steel Cooperage Company, Detroit, Michigan, and signed Bollinger Bros., by S. W. Bollinger, in which Bollinger Bros. say in part: "We settled up with the Sistersville Brewing Co. sometime ago, they accepting the Brewery off our hands in an uncompleted condition, giving us stock and bonds for our claim," and will ask you to state, if you know anything about the settlement between Bollinger Bros., and the Sistersville Brewing Company, which they speak about in that letter?

A. Nothing more than is set forth in the letter.

Q. Do you know anything about the number of bonds that Bollinger Bros. received, which they allude to in the letter?

A. I am informed that they received the total issue, I believe, of \$40,000.

Q. Who gave you that information?

A. Dr. Kirk.

Q. What position did he hold with the Sistersville Brewing Company?

A. He was Secretary of the company at the time our contract with them was made.

Q. Did Dr. Kirk inform you anything about the stock that Bollinger Bros. received, which is mentioned in their letter?

A. He informed me that they received a certain amount of stock; I don't remember the exact amount, if he told me.

Q. You may state whether or not the Detroit Steel Cooperage Company had anything to do with the bringing of the action of George W. Hartman and Bollinger Bros. against Sistersville Brewing Company in the Circuit Court of the United States for the Northern District of West Virginia?

A. It did not.

Q. You may state whether or not the Detroit Steel Cooperage Company consented to the decree of sale entered in that case in October, 1909?

A. It did not.

Q. Was the Detroit Steel Cooperage Company present by officers, counsel or agent at the meeting of creditors in that case?

A. They were not.

Q. You may state whether or not the Detroit Steel Cooperage Company had any notice of the entering of that decree of sale?

A. They had not?

Q. You may state whether or not Arlen G. Swiger and Thomas J. Jacobs, who signed that decree as counsel for all the unsecured creditors, represented the Detroit Steel Cooperage Company in any way?

A. They did not.

Mr. KIMBALL: I believe that is all.

Cross-examination.

By Judge JACOBS:

Q. All you know about the amount of the bonds that Bollinger Bros. got, is what Mr. Kirk said?

A. Yes, any more than what Bollinger Bros. say in their communication that they had made a settlement in consideration of certain stocks and bonds which they had received.

Q. They do not say how much, do they?

A. No.

Q. They do not say how much stock they received, do they?

A. No, they do not.

Q. Did you learn what that plant cost?

A. Why, at the time we made our contract with the Sistersville Brewing Company, we were informed that it had cost \$177,000.

Q. You knew that Bollinger Bros. had the contract for building it?

A. Yes.

Q. The Cooperage Company's officers, agents and attorneys knew of that fact, did they, that Bollinger Bros. had the building of the plant?

A. Originally, yes.

Q. They learned by correspondence that it had cost about \$177,000?

A. Yes.

Q. I understand you to say Mr. Fisk, that you know little about the practical operation of a brewery, or the building of a brewery?

A. Yes.

Q. You do know, however, that these chip casks are necessary to manufacture beer for market, do you not, or something to take the place of them?

A. Yes, in a general way.

Q. And that your company is manufacturing these chip casks for the purpose of use in breweries for the manufacture and completion of beer—the beer output?

A. Yes.

Q. And, of course, you recommend they buy them, to be used in their plants?

A. Naturally.

Q. Better than wooden casks, are they not?

A. We always claim they are; the brewers claim they are.

Q. You claim they are?

A. Yes.

Q. When installed in a brewery, they would be according to your opinion, the very best kind of casks that could be put in?

A. Yes.

Q. That is natural, and without them beer could not be made of as good quality by any other kind of cask?

A. Well, that is a question that brewers are not agreed upon; personally, I could not say.

Q. When your company undertook to furnish those casks and did furnish and deliver them, its officers and agents understood that the brewery company was largely indebted to Bollinger Bros., did they not?

A. We understood that Bollinger Bros. had accepted the bonds of the brewery in settlement of their claims.

Q. You understood you say, by correspondence at least, that they had taken the full issue of bonds?

A. Yes, I could not say as to whether that represented the full amount, whether their debt represented the full amount of the bonds or not.

Q. If the issue was \$40,000, and they took the whole issue, the brewery company was pretty considerably indebted to Bollinger Bros., was it not?

A. Only to the extent of their bonds.

Q. And stock also?

A. Stock is not necessarily indebtedness.

Q. It represents value, of course?

A. Not always.

Q. Supposed to. If the company handed over to Bollinger Bros. \$40,000 in bonds and some stock, what would that indicate?

A. Well, it would indicate that they were indebted to them to some extent.

Q. Indicate that they were indebted to the extent of those bonds, and the stock, both, would it not?

A. Not necessarily.

Q. Why not?

A. Well, frequently stock is given as a bonus for certain purposes.

Q. But Bollinger Bros. were doing the work, and they were receiving pay for it by way of stock and bonds, as you understood it?

A. Yes.

Q. That would indicate then that the brewery company—the Sistersville Brewing Company, owed not only \$40,000 represented by the bonds, but whatever stock they got, and were you not informed by correspondence with Mr. Kirk to that effect, that they had settled up for bonds and stock?

A. Yes; that would depend, of course, upon the value that they placed upon the bonds and stock, the amount of the indebtedness.

Q. I am not asking you about what the indebtedness is and was in dollars and cents; but that would indicate there was considerable indebtedness, would it not?

A. If the securities were taken at the par value, yes.

Q. Now, your company, the cooperage company, knew at the time you agreed to furnish direct, and did furnish direct to the Sistersville Brewing Company, that there was a bond issue, and a mortgage to secure that bond issue, did you not?

A. We presumed so.

Q. Haven't you the information conveyed to you by Mr. Bollinger in his letter?

A. Yes, to the effect that they had settled for—that they had taken stocks and bonds in settlement of their claim.

Q. Now, who was it looked after the recording of the paper which is called the retention of title, you or the president?

A. Mr. Kimball attended to the recording of it.

Q. It bears the correct date, does it?

A. So far as I know.

Q. The brewery company did not pay you the \$2,000 agreed to be paid?

A. No, they did not.

Q. When did you learn that they would not be able to pay you that \$2,000, before or after you furnished the goods?

A. After we furnished them.

99 Q. Before or after you furnished the tanks?

A. After we had furnished them.

Q. You say afterwards?

A. After, yes.

Q. How long afterwards?

A. Why, as near as I can remember, it was a month.

Q. Under the terms of that contract, you were to have that \$2,000 just as soon as the tanks were shipped, were you not?

A. Yes.

Q. And it could not have been a month?

A. They were shipped—I don't recall just the exact terms there.

Q. I call your attention to the terms.

A. When all the tanks had been shipped, yes.

Q. "The payments of above purchase price to be made as follows: \$2,000.00 when all of the tanks have been shipped"?

A. Yes.

Q. You did not get the \$2,000 when the tanks were shipped, did you?

A. No, we did not.

Q. You did not get the \$740 when they were erected in the brewery and tested?

A. No. Not in cash.

Q. What did you get it in?

A. We got a note of \$2,740 immediately after the tanks were shipped, and \$1,000 in cash a little later on. I say a month, it might not have been as long as that; I should say it was less than a month when we got a payment of \$1,000 in cash.

Q. So that they had been installed and completed at that time?

A. No, they had not, not when we received the notes.

Q. But the cash, I say?

A. That would depend upon the exact date of the payment; I could not say as to that.

Q. You are Secretary, are you not?

A. Yes, sir.

Q. Could you not tell the exact date of payment of that \$1,000?

A. I did not have an opportunity to look it up this morning that is the only reason I cannot. I came in from out of town, and I just got in town when I had to come up here. I had no opportunity to look up the account.

Q. When the tanks were shipped you were notified—I mean, you gave notice when the tanks were shipped?

A. Probably.

Q. You sent the engineer?

A. Yes.

Q. He was there some two weeks putting in these tanks, and the \$2,000 not yet paid, was he not?

A. Yes, sir.

Q. You did not call a halt in the operation on that ground did you?

A. No.

Q. He went on and completed the installation, and then you took the notes, and afterwards the \$1,000 was paid?

A. We took the note, the first note, immediately after we shipped the tanks, as I recollect it, in fact, I remember they sent us the note

100 as soon as we sent them the shipping bill. The \$1,000 cash payment was made a little later, I cannot say exactly how much later, but the note was received before the tanks were installed.

Q. That is all the money you ever got?

A. Yes, sir.

Q. After the notes became due, you made no effort to remove the tanks from the brewery building, did you?

A. No, sir.

Q. They have been there ever since?

A. Yes, so far as I know.

Q. You never have sued on the notes to get judgment, have you?

A. No, sir.

Q. And the notes are still in the possession of your company—the cooperage company?

A. Yes.

Judge JACOBS: That is all.

Redirect examination.

By Mr. KIMBALL:

Q. Mr. Fisk, I hand you here the notes marked Exhibit 1 W. L. Fisk, and Exhibit No. 2 W. L. Fisk, and ask you if either of those notes are the first note which was given you by the Sistersville Brewing Company?

A. They are not.

Q. What was done with the first note?

A. The first note and the balance of the account that was owing to us were included in these two notes, with the accrued interest on the former note.

Q. Those two notes taken by way of payment of the first note and the balance due?

A. On the account, yes.

Q. Have you any knowledge of what the indebtedness was from the Sistersville Brewing Company to Bollinger Bros. on their contract?

A. I have not.

Q. In the settlement between Bollinger Bros. and the Sistersville Brewing Company, have you any knowledge of the price that the bonds of the Sistersville Brewing Company were put in at, in the settlement?

A. I have not.

Q. Have you any knowledge at what price the stock was put in at in that settlement?

A. I have not.

Q. You do not know whether it was estimated at par or not?

A. No, I do not.

Q. Do you know whether or not there was any accrued interest on those bonds that went in with them or not?

A. I am informed that there was.

Q. Who informed you of that?

A. Dr. Kirk.

Q. Do you know how much interest, in the way of accrued interest went in with the bonds?

A. I do not recall the amount, no. I did know at the time.

Mr. KIMBALL: I believe that is all.

101 Recross-examination.

By Judge JACOBS:

Q. Mr. Fisk, the exhibit with Mr. Wiedeman's deposition shows that the plant had cost the company \$177,000, on which they had made a bond issue of \$40,000, does it not—near the bottom—and that letter was addressed to the company was it not?

A. Yes, sir.

Q. You had notice therefore that the brewing company was indebted at least to the extent of \$40,000, did you not?

A. Yes.

Q. And that too, before you made the delivery of the casks?

A. No. We knew there had been a bond issue put out of \$40,000.

Q. What is the date of that letter?

A. July 29th, 1908.

Q. The casks were not delivered until after that, were they?

A. No, sir.

Q. You, therefore, had notice that there was a bond issue of at least \$40,000 before you delivered the casks?

A. Yes.

Judge JACOBS: That is all.

Mr. KIMBALL: That is all.

STATE OF MICHIGAN,

County of Wayne, ss:

I, Fred A. Behr, notary public in and for said County and State, do hereby certify that the above witnesses Henry C. Weideman, John McConnell, Frank J. Huetteman, Hugo Bloquelle and Warren L. Fisk were by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that their depositions were taken down stenographically by Charles M. Hammond, in the presence of said witnesses, respectively, and in the presence of counsel for the plaintiff and counsel for the defendants, and said stenographic notes were then transcribed by said Charles M. Hammond into long hand; that the signatures of the witnesses to said depositions were waived by agreement of counsel; and that said depositions were taken pursuant to the attached stipulation and agreement of counsel for the respective parties to said cause, at my office at No. 84 Griswold street, Detroit, Michigan, on the 31st day of January, A. D., 1911, between the hours of 10:00 o'clock A. M. and 5:00 o'clock P. M.; that the parties were represented at the taking of said depositions by their re-

102 spective counsel as set forth; that the several exhibits recited were offered in evidence and marked as specifically noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit. In testimony whereof, I have hereunto set my hand and official seal this 3rd day of February, 1911.

FRED C. BEHR,

Notary Public, Wayne County, Michigan.

My Commission expires July 19, 1914.

Copy.

SISTERSVILLE, W. VA., *December 1st, 1908.*

\$2,531.15.

Ninety days after date we promise to pay to the order of Detroit Steel Cooperage Company twenty-five hundred thirty-one and 15/100 dollars at Peoples State Bank, Detroit, Mich.

Without defalcation, for value received with interest at 6%.

SISTERSVILLE BREWING COMPANY,

Per W. H. KIRK, *Sec'y.*

J. J. RECTENWALD, *Pres.*

No. —. Due —.

Endorsed on back: Pay The Peoples State Bank, Detroit, Mich., or order. Detroit Steel Cooperage Co., Detroit Steel Cooperage Co., By W. L. Fisk, Ass't Treasurer.

(The above is Ex. No. 2 W. L. Fisk.)

SISTERSVILLE, W. VA., *December 1st, 1908.*

\$2,000.00.

Ninety days after date we promise to pay to the order of Detroit Steel Cooperage Company two thousand and no-100 dollars at Peoples State Bank, Detroit, Mich.

103 Without defalcation, for value received with interest at 6%.

SISTERSVILLE BREWING COMPANY,

Per W. H. KIRK, *Sec'y.*

J. J. RECTENWALD, *Pres.*

No. —. Due —.

Endorsed on back: Detroit Steel Cooperage Co., By W. L. Fisk, Ass't Treasurer.

(The above is Ex. No. 1 W. L. Fisk.)

Ex. H. C. W. No. 1.

Bollinger Bros., Engineers-Contractors.

(Received June 29, 1908; answered 6/29, 1908, by N.)

PITTSBURG, PA., *June 27th*, 1908.

The Detroit Steel Cooperage Co., Detroit, Mich.

GENTLEMEN: We settled up with the Sistersville Brewing Co., sometime ago, they accepting the Brewery off our hands in an uncompleted condition, giving us stock and bonds for our claim.

They are now getting in shape to complete the plant, which we have obligated ourselves to do for the credit which we gave them in our settlement. They ask us to let them know how soon we could install the steel cooperage providing they can raise the necessary money, and shall ask you to kindly let us know just what shape you have this work in.

Yours very truly,

BOLLINGER BROS.
S. W. BOLLINGER, *Pres't.*

S. W. B. B. M. D.

Ex. H. C. W. No. 2.

800 KEEGAN BUILDING.
PITTSBURG, PA., *July 29*, 1908.

The Steel Enameled Cooperage Co., Detroit, Mich.

GENTLEMEN: I have been in consultation with Mr. S. W. Bollinger this week and he presented to me a letter from you stating that possibly we could make some arrangement whereby you would be enabled to place the entire quantity of cooperage in the Brewery at once. I would like very much if it was possible for us to arrange matters so this could be done. In regards to notes, I will say that we, at the present time, would be glad to negotiate a note for the balance, over \$2,000.00 of the \$5,480.00, for three months with the privilege of six, also with the privilege of paying the notes at any time. At the present time we have prospects of sale of the remainder of our stock, and if so, it would be a very short time until we would be able to take care of the notes. At the present time we owe nothing but a few thousand dollars on the plant. This is entirely for supplies which we have been using lately. Our plant, as far as it has gone, is entirely paid for, which cost us \$177,000.00, on which we have \$40,000.00 of bonds issued. We have at present 1,400 barrels of beer near three months old, which we wish to put on the market, but are unable to put it on the market until we get the chip casks. Just as soon as we get the casks in, we will be able to get this on the market and get an income. However, we do not intend to depend upon the income from the Brewery for your note, as we have still in the treasury \$20,000.00 of stock, which we are selling

with the expectation of using them for notes and the remainder of this for machinery needed, which includes your enameled tanks. If this is satisfactory to you, and if you will send notes to me at once, I will have them arranged and returned to you, and if you will see it to arrange these notes with the present conditions, please ship cooperage at once.

Very respectfully,

SISTERSVILLE BREWING COMPANY,
Per W. H. KIRK, Sec.

P. S.—We have quite a good deal of the \$20,000.00 stock subscribed for already, but the money will not be in, some of it, for one, two and three months as those who have subscribed for it have the money in the Building & Loan Association, and are unable to get it, some, for three months, etc. Hoping to hear from you at once, I am,

Respectfully,

W. H. KIRK, Sec'y.

Wrong Address, delivery delayed.

Received Aug. 3, 1908.

Answered Aug. 3, 1908.

Answered by W.

Dr. W. H. Kirk, 800 Keenan Bldg.

Ex. H. C. W. No. 3.

Proposal

From the Detroit Steel Cooperage Co., Detroit, Mich.

Chip Cask Specification.

(Cut of a Tank.)

To Sistersville Brewing Co., Sistersville, W. Va.

Date August 6, 1908.

Number and Description of Tanks.

Number of Chip Casks to be furnished 11.

Outside Diameter 8' 0". Inside Diameter 7' 6".

Number of rings in each Tank 3.

Height of each Ring 3' 6".

Thickness of material in Rings 5/16".

Thickness of material in Bottoms 7/16".

Height over all from Floor to Top of Tank 12' 10".

Capacity per Tank, in Barrels, at 3 1/2 gals. per bbl. 125.

The Bottom and Head of each Tank will be dished about ten inches.

All Tanks will be lined inside with our special glass enamel and bolted together as shown on above cut with our Perfection Gasket between flanges.

Fittings and Fixtures.

Each Tank will be provided with the following Fixtures and Fittings:

8 Cast Iron Adjustable Floor Stands.

One inside swinging manhole Door in lower Ring, enameled on inside.

One 1½ inch Lever handle straightway cock in lower Ring near bottom.

One Try Cock in second Ring.

One 3-inch Connection in centre of head with cap tapped for bung cock.

One special double Bung Cock.

One 1½ inch Connection in centre of bottom with a 1½ inch copper tinned pipe to extend outside of rim, which pipe will be provided with a 1½ inch brass straightway cock.

One special brass strainer for above connection to go inside of Tank.

Painting.

Each Tank will receive one coat of the best quality of Anti-Rust paint before leaving our Works.

Testing.

Each Tank will be properly tested and guaranteed tight under a pressure of 15 lbs. and to withstand an accumulative bursting pressure of 50 lbs. to the square inch.

Remarks.

Chip Cask. Specification.

To Sistersville Brewing Co., Sistersville, W. Va.

Date August 6, 1908.

Number and Description of Tanks.

Number of Chip Casks to be furnished 2.

Outside Diameter 8'0". Inside Diameter 7.6".

Number of Rings in each Tank 2.

Height of each Ring 3' 6".

Thickness of Material in Rings 5/16".

Thickness of material in Bottoms 7/16".

Height over all from Floor to Top of Tank 9' 4".

Capacity per Tank, in Barrels, at 31½ gals. per bbl. 84.

107 The bottom and head of each tank will be dished about ten inches.

All Tanks will be lined inside with our special glass enamel and bolted together as shown on above cut with our Perfection Gasket between flanges.

Fittings and Fixtures.

Each Tank will be provided with the following Fixtures Fittings:

7 Cast Iron Adjustable Floor Stands.

One inside swinging manhole Door in lower Ring, enameled on inside.

One 1½ inch Lever handle straightway cock in lower Ring near bottom.

One Try Cock in second Ring.

One 3 inch Connection in center of head with Cap tapped for bung cock.

One special double Bung Cock.

One 1½ inch Connection in Centre of bottom with a 1½ inch copper tinned pipe to extend to outside of rim, which pipe will be provided with a 1½ inch brass straightway cock.

One special Brass Strainer for above connection to go inside of Tank.

Painting.

Each Tank will receive one coat of the best quality of Anti-rust Paint before leaving our Works.

Testing.

Each Tank will be properly tested and guaranteed tight under a pressure of 15 lbs. and to withstand an accumulative bursting pressure of 50 lbs. to the square inch.

Remarks.

Material.

All material used in the construction of these tanks and fittings will be the best of its respective kind and will be free from sand-holes and all other defects. All plates to be of open hearth flange steel of best known quality and rolled specially for our purpose.

Flanges and Joints.

All rings will be neatly flanged about three inches and made in sizes as hereinbefore specified, and all flanges will be closely
108 drawn together by special washer head bolts 5/8" diameter and about 1¾" centres.

Between all flanges will be laid our "Special" Patented Perfection gasket so as to make a perfect tight joint and a metal finish on the inside of the tank, making it an entirely metal tank, easily kept clean and without any wear and tear on same.

Enameling.

After the interior surface of all rings and heads has been thoroughly sandblasted so as to remove every particle of scale and dirt, it

will be thoroughly coated with our own special prepared glass enamel and burned into the steel under a heat of about 1,780 degrees Fahrenheit, at which temperature the pores of the steel are thoroughly open and the enamel is incorporated into the very fibre of it and will last during the life of the tank. For this purpose we use a special designed furnace, which is muffled and so constructed that no live flames come in contact with the enamel and liable to damage same before it becomes amalgamated with the steel.

Conditions.

It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified and any notes and acceptances that may be given on account of any such payments, shall have been fully paid; and in case of default in any of said payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures.

Delivery.

We agree to furnish all of the 13 tanks, together with all fixtures and fittings as herein specified, P. O. R. cars at Sistersville, W. Va., on or before the — day of —, 190—, provided we are not delayed by accidents, strikes, riots, delays of carriers or other causes beyond our control.

Erection.

We will furnish the necessary labor and tools to erect in your brewery all of the herein specified tanks and connect the fittings and fixtures thereto in a first class and complete manner, also to test all of the tanks and make them perfectly tight under such pressure as before specified, but you are to furnish the necessary water or air for testing said tanks whenever it may be needed by our erecting Engineer.

109

Openings.

You are to provide all necessary openings in walls and buildings, to readily admit the tanks, finished and completed at our factory, so that they may be installed in their respective places and positions without being taken apart.

Price.

The price of all the 13 tanks, together with the fixtures and fittings thereto, delivered and erected as hereinbefore specified, is the sum of five thousand four hundred eighty dollars, \$5,480.00.

Terms.

The payments of the above purchase price to be made as follows: \$2,000.00 when all of the tanks have been shipped. \$740.00 when

erected at Brewery and tested. \$2,740.00 in the form of a promissory note, payable in three months from date with 6% interest per annum.

DETROIT STEEL COOPERAGE COMPANY,
By H. C. WIEDMAN, *Gen'l Mgr.*

Accepted Aug. 8, 1908.

We hereby accept the above proposition together with the conditions and terms as therein stated.

SISTERSVILLE BREWING CO.,
By W. H. KIRK, *Sec'y.*

(Endorsements.) Attest: J. W. Duty, Clerk. #1059. Proposal from Detroit Steel Cooperage Co., Detroit, Mich., to Sistersville Brewing Co., Sistersville, W. Va. Clerk's Office County Court, Tyler County, West Virginia, ss: Received for record 7th day of Dec., 1908, at 6 P. M. and recorded in D. of T. Book No. 13, page 341, \$1.50 fee Bill. #7116. J. W. Duty, Clerk. Ent'd. Presented in the Clerk's office of the County Court of Tyler County, West Virginia, on the 7th day of December, 1908, and admitted to record.

110

DEPT. EX. 4,

Rollinger Bros.,

Engineers, Contractors.

PITTSBURG, PA., July 22nd, 1908.

The Detroit Steel Cooperage Co., Detroit, Mich.

GENTLEMEN: We have just received your telegram of even date, in answer to our telegram, and have again wired you as follows: Ship four large chip casks at Sistersville, C. O. D. Letter following, which we hereby confirm.

Our agreement with the Sistersville Brewing Co. is that they shall pay cash for this material; therefore, we would ask that you ship four 125 barrel chip casks, with necessary fittings, to yourselves at Sistersville, W. Va. Attach sight draft for \$2,000 to B. L. with instructions to deliver to Sistersville Brewing Co. when draft is paid, and send through your bank to Sistersville for collection. In this way the Sistersville Brewing Co. would not receive the cooperage until this amount is paid.

As this money will be paid to you direct, you should prepay the freight. We believe that the \$2,000 will fully pay you for the value of chip casks and freight, also pay for time and expenses sending your erecting engineer to unload cooperage and erect same. If you feel that the \$2,000 will not fully pay you for the four chip casks, freight and erecting same, advise us at once and we will instruct you further regarding shipment, and probably substitute one or two of the small casks which are included in this contract.

We do not believe that the Sistersville Brewing Co. have more

than \$2,000, which they can pay upon cooperage at the present time.

Yours truly,

BOLLINGER BROS.
O. J. TOPE, *Sec'y.*

O. J. T.
B. M. D.

Received July 23, 1908.
Answered July 23, 1908.
Answered by W.

Bollinger Bros.

Engineers, Contractors.

PITTSBURG, PA., *July 25th, 1908.*

The Detroit Steel Cooperage Co., Detroit, Mich.

GENTLEMEN: Replying to your letter of the 23rd inst., we sent copy of your letter to Dr. W. H. Kirk, (Secretary of the Sistersville Brewing Co.) Keegan Bldg., City, requesting him to take the matter up with you direct concerning shipment of balance of steel cooperage.

Dr. Kirk can give you an accurate financial statement of the Company.

In our settlement with the Sistersville Brewing Co., we estimated the entire cost of steel cooperage erected complete, to be \$5,480, which price we wish adhered to, should you make satisfactory arrangements to ship and install all the cooperage.

Yours truly,

BOLLINGER BROS.,
O. J. TOPE, *Sec'y.*

O. J. T.
B. M. D.

P. S.—You understand that should you make any arrangements with the Sistersville Brewing Co., to ship balance of cooperage, such arrangements for the pay thereof will be with the Sistersville Brewing Co. exclusively.

Received July 27, 1908.
Answered July 27, 1908.
Answered by W.

112

DEFT. EX. 6.

Bollinger Bros.,

Engineers, Contractors.

PITTSBURG, PA., August 4th, '08.

Detroit Steel Cooperage Co., Detroit, Mich.

GENTLEMEN: Replying to yours of the 3rd inst. inquiring as to the person-el of the Sistersville Brewing Co. officials have to say, they are clean, upright, honorable men. Drs. Rectenwald and Kirk (both young men) enjoy a large practice and bear splendid reputations. The treasurer A. R. Dayk is a young business man, has accumulated considerable property and is highly esteemed, and in all probability will become manager of the Brewery. Their one handicap is scarcity of money.

Yours,

BOLLINGER BROS.
S. W. B.*Depositions on Behalf of Defendants.*

Filed Feb'y 21st, 1911.

DETROIT STEEL COOPERAGE COMPANY, a Corporation, Plaintiff,

vs.

SISTERSVILLE BREWING COMPANY, a Corporation; GEORGE W. HARTMAN and BOLLINGER BROS., and Others, Defendants.

Depositions of witnesses taken on this 14th day of February, 1911, at the office of Bollinger Bros., in the city of Pittsburg, on behalf of the defendants, and to be read in evidence on their behalf by consent of the counsel for the plaintiff and for the defendants.

And it is agreed and stipulated that the same will be taken in stenographical notes by Blanche M. Dunne and by her written out in English, and certified by A. M. Steen, notary public; the signatures of the witnesses being waived.

113 Present:

For the plaintiff: Mr. Charles M. Kimball, of Sistersville, W. Va.

For the defendants: Mr. John H. McCoy, of Sistersville, W. Va.,
Hon. Thos. P. Jacobs, of New Martinsville, W. Va.

SIDNEY W. BOLLINGER, a witness of lawful age, being produced on behalf of the defendants and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Judge Thomas P. Jacobs, counsel for defendants, as follows:

Q. State your name, age, place of residence, and occupation?

A. Sidney W. Bollinger; age 46 years; residence, Pittsburgh, Pennsylvania; occupation, Architect, Contractor.

Q. State whether the organization known as Bollinger Bros. is a firm or a corporation?

A. It is a corporation.

Q. Incorporated under the laws of what state?

A. Pennsylvania.

Q. Is it at present an active live corporation?

A. It is.

Q. State whether you are acquainted with any of the members of what is known as the Sistersville Brewing Co., Sistersville, West Va.?

A. I am.

Q. State what connection your corporation had with the construction of the Brewery plant of that company?

A. We had the contract to build the Brewery.

Q. Now, did that include the Brewery complete?

A. Brewery complete, furnishing all machinery required therefor.

Q. You may state how far your corporation proceeded in the construction of that plant?

A. We fulfilled our contract excepting the furnishing and installing of one ice machine, the steel chip casks, and a few other small things.

Q. The chip casks you did not install nor furnish?

A. No.

Q. Who did furnish the chip casks?

A. They were furnished by the Detroit Steel Cooperage Co.

Q. The plaintiff in this case?

A. Yes, sir.

Q. Where are the chip casks installed in a Brewery?

A. In the chip cellar; usually on the first floor but not always.

Q. Will you please state how the Detroit Steel Cooperage Co. came to furnish and install the chip casks?

A. Bollinger Bros. gave the Detroit Steel Cooperage Co. an order for these casks, then had them hold up shipment until the Sistersville Brewing Co. could arrange their financial matters better. Then we settled with the Sistersville Brewing Co. in full, accepting stock and bonds for the amount then due us, giving them credit
114 of \$10,000 for the chip casks, ice machine and other things not furnished. We obligated ourselves to furnish these things for which we gave them credit if within one year they would raise and pay us the \$10,000. We received information from them that their money matters were shaping themselves and that they would be ready in a short time to put in the steel cooperage. We wrote the Detroit Steel Cooperage Co. and told them that we had settled in full, received stock and bonds for our pay, and asked them in what shape they were as regarded completing or shipping the steel cooperage, that the Sistersville people would likely want same in a short time. We then learned that they did not have the ready cash for us and, of course, we refused to put in the cooperage. We

then suggested that they take the matter up direct with the Detroit Steel Cooperage Co., which they did, resulting in making an arrangement with the Detroit Steel Cooperage Co. to install the cooperage.

Q. Then who did furnish and install the steel cooperage?

A. The Dertoit Steel Cooperage Co.

Q. And your corporation, as I understand you, had nothing to do with furnishing or installing same?

A. Our contract was cancelled. We had nothing to do with it.

Q. And you had taken stock in the Sistersville Brewing Co. and also some of its bonds, in payment on your contract for construction?

A. All of the bonds and some stock.

Q. How many bonds?

A. \$40,000, the total issue.

Q. And how much stock?

A. In the neighborhood of \$50,000.

Q. State whether or not that stock and the bonds were taken by your corporation in good faith and payment for the work you had done in constructing the Brewery?

A. They were.

Q. Do you know about when the steel cooperage was installed or commenced?

A. I think in the spring or summer of 1908.

Q. Now, what provision had been made by your company by way of convenience in installing—putting in place and installing the cooperage?

A. In building a Brewery in which we wish to install steel cooperage, it is customary for us to leave an opening through which the cooperage can be taken.

Q. Did you leave such opening in this particular Brewery?

A. We did.

Q. Now, how are the casks placed in the Brewery, that is, how are they supported?

A. The casks stand vertical and are supported upon cast iron stands which rest on the floor.

Q. How many of those stands are used usually?

A. It depends upon the size of the cooperage. In this instance I think six to eight for each cask.

115 Q. And do you recollect how many casks were installed?

A. Oh! about one dozen—approximately.

Q. Now, after the casks are installed, what is done with the opening through which they were passed into the Brewery?

A. The opening is bricked up so as to be like the balance of building. The insulation is then put on on the inside of the wall; the insulation is cork, and the cork is then plastered with cement plaster and often enamelled.

Q. Often enameled?

A. Often enameled.

Q. Do you remember the thickness of the brick wall in the Sistersville Brewery?

A. 18", I think.

Q. And after the cooperage is installed, you say that opening is filled in by a brick wall the same thickness as the remainder of the building?

A. Usually, yes, sir.

Q. And next to that what is put on the inside?

A. The cork insulation.

Q. What is the purpose of that cork insulation?

A. We usually put the cork insulation on the walls of the cellars for the purpose of insulation, keeping the heat out and the cold in.

Q. Now, what thickness is that cork insulation?

A. Mostly 3". The cork boards are cemented onto the brick wall, then plastered on the outside of that.

Q. That would be entirely on the inside of the building?

A. Yes, sir.

Q. Now, state whether that cork insulation is made in one, two or three layers, or more or less.

A. We nearly always put ours on in one layer; sometimes in two. In this instance it was put on in one layer and cemented to the wall.

Q. State whether or not that wall on either side and above and below is laid in contact with the remaining wall.

A. It is bricked up tight against the other wall and in some cases interlocked with it.

Q. Now, what ordinarily—or what specially in this case was the thickness of the cement on the inside against the cork insulation?

A. About half an inch to three-quarters.

Q. The cement?

A. Yes, sir.

Q. Now, that opening, as I understand you, is the only place through which the tanks can be taken into the Brewery and placed, is it?

A. It was left there for that purpose.
was left there for that purpose.

Q. Left there for that purpose? And it is the only place?

A. Yes, the only place.

Q. What was the capacity of those tanks in gallons?

A. I think about 100 barrels. A few of them were smaller.

Q. Now, how is the beer received into those casks?

A. By gravity from stock tubs above—I mean, through rubber hose connection.

116 Q. And from what tanks is the beer taken when put in barrels or kegs for market?

A. Always taken from the chip casks.

Q. Mr. Bollinger, what is the object of putting beer in the chip casks?

A. It is put there in some instances to age the beer and by the use of chips through capillary, to clarify it of sediment, adhering to the chips and then to create a pressure and carbonic gas by the admission of fresh beer, and thus prepare the beer ready for consumption.

Q. As the beer is in the chip casks, is it under a pressure?

A. It is, by reason of the carbonic gas created.

Q. Is it possible to conduct a Brewery and manufacture beer for market without chip casks of some kind?

A. In all of our Breweries we use chip casks. I never knew of a Brewery run successfully without them.

Q. State whether or not the specifications for the Sistersville Brewery specified chip casks?

A. It did.

Q. Steel cooperage?

A. Steel cooperage chip casks.

Q. State whether or not the chip casks in that Brewery were put in there for permanent use in connection with the Brewery?

A. They were put in for permanent use; never intended to be removed.

Mr. KIMBALL: Answer objected to as being a mere conclusion of the witness.

Q. Could beer be brewed and completed without those casks?

A. Not without chip casks or pressure tanks.

Q. State whether or not the Brewery would be complete without such casks?

A. It would not be complete, no, sir.

Q. If those casks by any means were taken out, what effect would it have on the Brewery as a manufacturing plant?

A. We would have to put other chip casks in to complete it, so as to be enabled to make beer.

Q. With those chip casks removed would any one be able to manufacture beer?

A. Not without them or some other system.

Q. Now, something has been said in depositions taken in this case about removing the wall and removing the casks. What effect would taking out the wall and the cork insulation and the cement plaster have upon the wall?

A. It would have no effect upon the balance of the building.

Q. What would have to be done to take that wall out so as to remove the casks?

A. The plastering and the cork insulation would be destroyed, as the cork would have to be taken off in small pieces by some tool (a pick is usually used, or *maddock*); then the wall taken
117 down, the casks removed and, of course, the wall bricked up, new insulation obtained and the work done over again.

Q. In such a process as that, that is, removing the bricks, cork, insulation and the cement plaster, could the same or any part of it be used again, or would it be destroyed?

A. The plastering and cork insulation would be utterly destroyed, many of the brick would be destroyed. It would be necessary to make a nice job, to have all new brick for facing; the old brick could be used inside after cleaned.

Q. You may state whether there is any piping, iron or steel piping, in connection with the manufacture and the making of the beer in that building?

A. Usually the cooling coils pass along the end of the building

where the opening is and if so, they would have to be removed. In some instances water pipes are placed there also.

Q. Now, if the cooling coils or other iron and steel piping was used in this particular instance and it was proposed to remove the tanks, could they be removed without taking out the piping?

A. The piping in the way would have to be moved.

Q. State whether or not such casks as you speak of are a necessary part of the Brewing plant?

A. Yes, sir, they are.

Q. And whether or not they could be taken out without material injury to the plant?

A. The plant could not be operated without them.

Q. State whether or not you were ever a director of the Sistersville Brewing Co.?

A. I was not.

Q. State whether or not you were ever a stockholder of it until you took the stock in payment for labor and material?

A. No, sir, I was not.

Q. State whether or not you ever had any interest in it in any shape or form until you took the bonds and the stock in settlement of your bill against the corporation?

A. No interest other than contract.

Q. State whether the story or cellar in which these casks are located is on the level of the ground, or below the ground or above the ground?

A. About level on the side, a little below the ground on the end where the casks are taken in.

Q. Are you acquainted, Mr. Bollinger, with Mr. George W. Hartman?

A. I am.

Q. Where does he reside?

A. McKeesport.

Q. State whether or not Mr. George W. Hartman was interested in any form in the construction or ownership of the Sistersville Brewing Co. at the time you built it?

A. He was not.

Q. Do you know how long after you had constructed it that he became interested and how?

A. I traded some of my bonds with him, about two years
118 ago, for Pittsburg property.

Q. And he became the holder of some of the bonds?

A. He did, and some stock also.

Q. State whether or not that was the first time that George W. Hartman became interested in the Sistersville Brewing Co.

A. To the best of my knowledge and belief it was.

Q. The plaintiff's bill of complaint in this case charges, upon information, and believe it a fact, that Mr. George W. Hartman and the Bollinger Bros. were active and leading promoters of the organization of the said Sistersville Brewing Co. and the constructing and equipping of said Brewery. Is that correct?

A. I did not know nor did I ever meet Mr. Hartman until about

the time I traded the bonds for property. He was not interested in any way. I never met, I believe, but two of *of* the directors of the Sistersville Brewing Co. prior to getting the contract. I was not connected in the promoting of it in any way.

Q. Not a promotor in any sense?

A. No, in no sense.

Q. Who prepared and furnished the specifications and plans?

A. Bollinger Bros.

Q. State whether or not that was in your contract with the Sistersville Brewing Co.?

A. It was part of our contract.

Q. Do I understand you that you did not know Mr. George W. Hartman until you traded him the bonds and stock?

A. I did not know him until that time.

Q. So it is a fact, then, that he was not a promotor of the Sistersville Brewing Co.?

A. That is a fact.

Q. Mr. Bollinger, in your correspondence with the Detroit Steel Cooperage Co., relating to the furnishing of the cooperage, state whether or not you gave to that company true and exact information as to conditions of things at Sistersville and of the condition of the Brewing Co.?

A. I do not recall that I explained the matter to them further than stating that we had settled in full with the concern, received stock and bonds therefor, and upon an inquiry from them, if I recall correctly, as to the personnel of their officers, I stated they did not have much money but the personnel of their officers was high, or good.

Q. State whether or not you gave them any misinformation, or wrong information about the condition of affairs?

A. I was very careful to not misrepresent anything.

Q. Do you know how they shipped—that is, whether they attached draft to the bill of lading, or anything of that kind?

A. By reason of the Sistersville people not having much money, we advised that they ship the cooperage with bill of lading attached to sight draft.

119 Q. Do you remember what amount you suggested that the sight draft should be?

A. I think two thousand dollars, the amount of the first payment.

Q. Now, how did you convey to the Steel Cooperage Co. that information—personally or by letter?

A. By letter, as I recall it.

Q. Do you know whether they so shipped or not?

A. I do not.

Q. After you had settled with the Sistersville Brewing Co., taking the stock and bonds, as you have indicated, had you any further connection or relation to the Sistersville Brewing Company?

A. We had not.

Q. You did not resume, after that time, as I understand you, and connection with the Brewing Co. for any purpose?

A. None whatever.

Q. Now, the bill of complaint in this pending case suggests and avers that the tanks, fixtures and fittings furnished and erected by the Detroit Steel Cooperage Co., plaintiff in this case, can be removed from said Brewery without injuring or impairing the value of the real estate, buildings or any other part of said Brewery. Is that your judgment about the matter?

A. It is not.

Q. It is further averred that the removal of said tanks, fixtures and fittings will not cause or occasion any diminution in the value of the buildings, real estate or any part of said Brewery, as they would have stood had said tanks, fixtures and fittings not been constructed, furnished and erected. What is your judgment on that?

A. The chip casks are among the most important parts of a Brewery.

Q. What number of years experience have you had, Mr. Bollinger, in the erection and construction of Brewery plants?

A. About ten years; about forty plants.

Q. In what parts—what different states of the Union have you built?

A. From coast to coast.

Q. If these tanks about which you have been testifying were, by any process, moved and taken out of the building, I believe you have stated that beer could not be manufactured?

A. Yes, sir.

Q. State whether or not, therefore, these tanks are a necessary part of the plant?

A. Absolutely necessary.

Q. State from what tanks beer is taken for the purpose of putting it on the market?

A. From the chip casks exclusively.

Q. From the chip casks exclusively?

A. Yes, sir.

Q. How is it taken?

A. By means of rubber hose.

Q. Rubber hose is attached to the tanks and then to the barrels?

A. It is attached to the tanks and not direct to the barrels but through a filter and racker to the barrel.

120 Q. And as the beer is drawn from the tanks through the filter into the barrels, is there connection with these tanks and other tanks by which they are filled up again, or do you fill in at stated intervals?

A. The tank is entirely emptied before you put any other beer in, then the chips taken out, washed, the tank is thoroughly cleaned, closed up and other beer run into it so as to be treated.

Q. Now, regarding the other beer to be run in, state whether or not you fill up the tank?

A. We fill up the tank from the stock tubs on the floor above.

Q. And thus the beer is treated as you indicated before it is ready for the market?

A. Yes, sir.

Q. What do the chips consist of?

A. The chips are little strips of cedar wood, about 1/16" thick, or a little greater, by seven-eighths to one inch wide, and two to four feet long.

Q. They are little strips of wood, used for purposes as you have indicated heretofore?

A. Yes, sir.

Q. To remove the wall and the cork insulation and the cement plastering, would involve, you say, the destruction entirely of the insulation and the cement plastering and some of the brick?

A. Yes, sir.

Q. Is there any way of determining approximately what it would cost to make that kind of a dismantling of the wall?

A. The cost would vary in different locations. The cost of cork insulation alone would amount to thirty to forty dollars; the entire cost approximately say eighty to one hundred dollars.

Q. Mr. Bollinger, will you state any other matter that in your opinion, from your experience in this kind of work, would deteriorate in value the plant of the Sistersville Brewing Co. to remove those tanks?

A. It would decidedly.

Q. I say, will you specify any other matter besides that you have already spoken of, and to which your attention has been specifically called, which would deteriorate or depreciate the value of the Sistersville plant?

A. It would destroy the connections of the bunging apparatus and the attemporator system that is not connected to all of these tanks.

Q. Now, what do you mean by the bunging process?

A. That is, the system that is connected with the tanks so as to enable the racking and withdrawing of the beer to barrels, other than through the rubber hose before spoken of.

Q. That system would be entirely dismantled?

A. Entirely dismantled, yes, sir.

Q. State whether or not it is a fact that the removal of those tanks would necessarily lead to the dismantling of other portions of the system of making beer.

A. You could not manufacture beer without them or some others to replace them.

121 Q. What would that Brewery plant be worth as a Brewery, from its stand point of the manufacture of beer, with those tanks out—would it be worth anything?

A. They could not manufacture beer without those tanks. If they were taken out, others would have to be put in.

Q. And so, with the tanks out and the necessary dismantling process that would follow, the Brewery would be no Brewery at all?

A. It would not be a Brewery without them.

Q. Mr. Bollinger, all of your work was done before the Detroit Steel Cooperage Co. furnished anything, was it not?

A. We settled in full with the Sistersville Brewing Co. before that time.

Q. Whatever they furnished in the way of steel cooperage, or whatever they did by way of labor, was all done after you had settled with the Company?

A. After we had severed our connections; that is, after we had settled.

Q. Now, it is alleged in bill of complaint that the Detroit Steel Cooperage Co., for the cooperage furnished and the labor it had performed, was given a reservation of title to the property so furnished, and that that was done with the knowledge and consent of the secretary, Mr. W. H. Kirk. State whether or not your Company had any connection with preparing or making or securing the alleged reservation of title on the cooperage?

A. None whatever. We were not concerned in that.

Q. Did you know at the time it was done?

A. No, sir, we did not.

Q. I will ask you to state whether or not, at the time you took the stock and bonds in settlement, you knew the fact to be that those bonds were secured by a mortgage on the property of the Sistersville Brewing Co.?

A. I knew it was, yes, sir.

Q. The bill of complaint further says that George W. Hartman and that Bollinger Bros. had actual notice at the time the alleged reservation to the title was made. Was that true?

A. It was not.

Q. State whether or not your bonds and stock was received by you in settlement as a matter of fact before the Detroit Steel Cooperage Co. had furnished anything?

A. It was received by us before that time.

Q. About what length of time—about how many months?

A. I don't recall. I could make a guess—about six months.

Q. It is also alleged that Mr. Sell, the trustee in the mortgage, has failed and refused to act. Are you or your company in any way responsible for his failure to act as trustee?

A. Not at all, no, sir.

Q. What is the height in story of the Sistersville Brewing Co.?

A. Four stories high; parts of it. Parts two stories and part only one story.

Q. Built of what material?

A. Brick, steel, concrete.

122 Q. And state whether or not it is built according to the plans and specifications?

A. Strictly in accordance with the plans and specifications.

Q. And those plans and specifications were prepared by you at whose instance?

A. At the instance of the then President and Manager, Mr. Ecker.

Q. H. P. Ecker?

A. Yes, sir.

Judge JACOBS: I believe that is all, sir.

Cross-examination.

By Mr. KIMBALL:

Q. The Bollinger Bros. then prepared the plans and specifications by which the Sistersville Brewing Co. was erected, as well as the contract for the building of it, did they?

A. They did.

Q. Are you a practical brewer, Mr. Bollinger?

A. I am not a Brewmaster.

Q. Have you a copy of the plans and specifications of the Sistersville Brewing Co. here in your office?

A. We have a copy of the plans, and I think the specifications.

Q. The plans of the Sistersville Brewery, as prepared by you, provided for an arched opening in the chip cask room, for the admission of the chip casks, did they not?

A. They did.

Q. And that opening was an arched opening?

A. It was.

Q. What were the dimensions of it, as provided in the plans?

A. Ten feet wide, twelve feet high.

Q. Was that opening left as provided in the specifications and shown on the plans?

A. It was.

Q. How was the arch specified on the plans and specifications?

A. It was just shown on the drawing.

Q. What reinforcement in the arch over the top of the opening?

A. Row locks of brick.

Q. How many locks?

A. I do not recall.

Q. Can you state by examining your plans?

A. Yes, sir.

Q. Will you do so?

A. Eight inches. Two rows.

Q. Any reinforcement provided on the sides of that arch?

A. No.

Q. What do your plans show with reference to the contour or edge of that arch? Is it an unbroken edge or side or a continuous solid edge or side?

A. A straight unbroken edge.

Q. Then, if the Brewery was built according to your plans, could that arched opening not be interlocked on the sides of the Brewery?

A. Not on the face. It could be on the inside.

123 Q. Did your plans provide for any window or other opening in the arched opening after it should be walled up?

A. One window.

Q. What was the size of that window, as provided in your plans?

A. Three foot six by nine feet.

Q. And in what position in the arched opening?

A. In the center.

Q. Do you know whether or not that window as provided in the

plans was actually left in the arched opening when the opening was walled up, or not?

A. Think the window was put in.

Q. You have visited the Sistersville Brewery since that arch was walled up?

A. On several occasions, yes, sir.

Q. When was the Brewery building itself completed?

A. I don't recall.

Q. Have you any data in the office by which you can refresh your recollection?

A. Oh, yes. I can do that.

Q. Will you please do so?

A. It will take some little time. I imagine about 1906.

Q. What time during the year 1906?

A. I do not recall.

Q. I wish, Mr. Bollinger, you would look at your data.

A. About the spring of 1906.

Q. Then the building of the Sistersville Brewery was completed along about the spring of 1906?

A. Yes, sir.

Q. The arched opening then that was left in the wall remained there until when? About when was that filled up?

A. It was not filled up until after they put the steel cooperage in.

Q. And when was that?

A. I don't know.

Q. The evidence already taken in the case shows that that was in August, 1908. Would that be about correct?

A. So far as I know.

Q. When, if you know, was the arched opening through which the chip casks were taken into the chip cask room, walled up?

A. I don't know.

Q. When did you make your settlement with the Sistersville Brewing Co., by which you took over the bonds and stock?

A. I don't recall.

Q. Will you look at some data and refresh your memory on that part?

A. We have it entered on our books as May 1st, 1908.

Q. That was the date of your settlement with the Sistersville Brewing Co.?

A. I suppose so.

Q. And on that date you took over the \$40,000 in bonds and \$50,000 worth of stock?

A. Approximately.

Q. In your settlement with the Sistersville Brewing Co., did you allow par for those bonds?

A. Par for the bonds but not for the stock.

124 Q. At what rate did you figure the stock?

A. I don't recall.

Q. Have you any data by which you can refresh your memory on that point?

A. No, I haven't, but I think it was ninety we took the stock at. I am morally certain it was at ninety.

Q. What work did you do on the Sistersville Brewery at Sistersville, W. Va., after that settlement?

A. None.

Q. None whatever?

A. No, none.

Q. Your settlement with them provided an allowance to the Sistersville Brewing Co. of \$10,000 for the chip casks or tanks and the ice machine and fittings?

A. Yes, sir.

Q. You took over the stocks and bonds in that settlement and withdrew from the contract and did nothing more on the Sistersville Brewery?

A. Correct.

Q. You have spoken about the chip casks being installed in a cellar. In speaking of Breweries, each story is called a cellar, is it not?

A. Each storage story is called a cellar.

Q. Then the term "cellar" does not necessarily imply below the surface of the ground, as is ordinarily understood?

A. It does not.

Q. You have stated that you knew several of the parties or persons interested in the Sistersville Brewing Co. at the start; who were those?

A. Only two, I think, that I recall. Mr. Ecker, the President, and his brother-in-law. I don't recall his name. I believe those were the only two I knew before we got the contract.

Q. That was Mr. H. P. Ecker?

A. Correct.

Q. You don't recollect his brother-in-law's name?

A. No, sir.

Q. Through whom did you obtain the contract for building the Brewery?

A. Through Mr. H. P. Ecker.

Q. What position did he hold at that time?

A. President and Manager.

Q. When did he withdraw?

A. I don't know.

Q. I believe you stated he was President and Manager? Was he President and Manager all the time you were connected with the Sistersville Brewing Co.?

A. No.

Q. Who became president after Mr. Ecker?

A. Mr. Rectenwald, a Doctor.

Q. Who was vice-president?

A. I don't know.

Q. Do you know who the Secretary was?

A. The Secretary and Treasurer, or one of these offices, was occupied or filled by Dr. Kirk.

Q. Dr. W. H. Kirk, of Pittsburg?

A. Dr. W. H. Kirk.

Q. When you turned over the Sistersville Brewing Co. to the Company, when this settlement was made in May, 1908, the Brewery

125 was entirely completed with the exception of the installing of the chip casks, the ice machine and walling or filling up the arched opening left for bringing in of the chip casks or tanks, and a few minor fittings, was it not?

A. Yes, sir.

Q. When you turned over the Brewery then, the insulation was installed throughout the chip cask or tank room, except on the arched opening, was it not?

A. Yes, sir, except that end of the building.

Q. Then, if that was put on it was put on after you gave up the contract?

A. It was put on afterwards.

Q. Do you know who put it on?

A. The Sistersville Brewing Co. Some cork was left there for that purpose.

Q. Do you know whether or not it was put on?

A. Yes, it was put on.

Q. You have inspected it?

A. I have.

Q. Now, the chip cask or tank room in the Sistersville Brewery, in which these tanks are installed, is on the ground floor, is it not, of the Brewery building?

A. It is.

Q. Is that on a level with the ground or not?

A. Practically so.

Q. When you entered into this contract to build the Sistersville Brewery, you also entered into contract with the Detroit Steel Cooperage Co. for the chip casks or tanks, did you not?

A. A good while afterwards we entered into the contract with the Detroit people.

Q. Then, when did you enter into the contract for the building of the Brewery?

A. I think the summer of 1905.

Q. Mr. Weideman, the President of the Detroit Steel Cooperage Co., has testified that their Company entered into contract with Bollinger Bros. for the chip casks or tanks for the Sistersville Brewery on August 10th, 1905. Do you state that Mr. Weideman was incorrect in stating that date?

A. No, I would not. It might be that we began to build it earlier than that, maybe 1904.

Q. Bollinger Bros. have entered into a number of contracts with the Detroit Steel Cooperage Co. for chip casks for Breweries they are building, have they?

A. Quite a number, yes, sir.

Q. You are an Architect, Mr. Bollinger?

A. Yes, sir.

Q. Mr. Bollinger, what is the difference in the strength of an arched opening left in a wall of a building and the wall being built up solid without the arch?

A. That would depend. It does not enter in here at all.

Q. I am not asking you if it enters into this. I am asking you

what is the difference in the strength of a wall with an arched opening and a solid wall without the arch?

A. That depends entirely on conditions.

Q. But when the building is new, it settles more the first 126 few years, does it not?

A. All brick buildings settle for two or three years.

Q. And during what period of their age do they settle fastest?

A. They settle faster at first.

Q. Then the Sistersville Brewery stood for a long time with this arched opening left in the wall and while the building was newest, did it not?

A. It did.

Q. And the settling would occur during that period, would it not?

A. Most of it would.

Q. Why did you make this settlement with the Sistersville Brewing Co., instead of taking over the bonds and stock as originally provided for?

A. They had no money to pay us.

Q. You had not much confidence in them financially then, did you?

A. Well, they didn't have the money.

Q. And at that time the chip casks or tanks had not been installed in the Brewery building, had they?

A. They had not.

Q. And in fact, they weren't installed until some time afterwards?

A. Not until some time afterward.

Q. When were you in the Brewery of the Sistersville Brewing Co. last?

A. Oh, possibly three or four months ago.

Q. Were you in the chip cask or tank room at that time?

A. Yes, sir.

Q. Were the chip casks or tanks in the chip cask or tank room at that time?

A. Yes, they were.

Q. Do you know whether those were the same tanks that were—the same tanks as installed by the Detroit Steel Cooperage Co.?

A. Necessarily they must have been the same ones.

Q. After you entered into the contract with the Detroit Steel Cooperage Co. for the chip casks or tanks for the Sistersville Brewery, you had them hold up the order, did you not?

A. Yes.

Q. Why did you do that?

A. By reason of the completion of the building being held up for lack of funds.

Q. On whose part for lack of funds? On your part or the Sistersville Brewing Co.?

A. Necessarily, the Sistersville Brewing Co.

Q. Now, if you will refer to your plans of the Sistersville Brewery again, I will ask you to state how far above the surface of the ground is the bottom of the arched opening which you provided for the admission of the chip casks or tank?

A. The top of the arch?

- Q. The top of the threshold, or bottom of it?
A. About two feet.
Q. And how far above the surface of the ground is the
127 bottom of the window which is left in that arch?
A. I don't know.
Q. Can you tell by referring to your plans?
A. I don't know that it is put in exactly as shown.
Q. Will you please look at your plans and see?
A. About two to three feet.
Q. You had nothing to do with the putting in of that window?
A. We had nothing to do with it.
Q. What height is the bottom of the window above the surface
of the ground?
A. About five feet.
Q. And how high is that window as provided in your plans?
A. Nine feet.
Q. And how wide did you say?
A. Three feet six inches.
Q. Have you the original tracing from which these blue prints
were taken, in the office?
A. I don't know. I think we have. We usually preserve them.
Q. Will you file with your deposition in this case either the original tracing showing this arched opening or a blue print from the same, as provided for in your original plans and specifications?
A. I will file a blue print of this opening, or a tracing thereof, as shown on the original plans.

Blue Print marked Exhibit A, S. W. Bollinger.

- Q. Can you say whether or not, in filling up the arched opening your original plans were followed out?
A. Usually they are, but in this case the belt course may have been lowered.
Q. What do you mean by the belt course?
A. That is the stone belt course between the stone foundation and the building.
Q. Do you know who did the work of filling in that arched opening with the brick?
A. Yes, sir.
Q. Who did it?
A. Mr. Burkhardt, of New Martinsville; the original brick contractor.
Q. Did he use cement or mortar in the brick work in filling in that arched opening?
A. I don't know.
Q. Who put on the cork insulation on the end of the chip cask or tank room in which this arched opening was left?
A. Some laborer for the Sistersville Brewing Co.
Q. In what size sheets or pieces was it put on?
A. 12" wide by 3'-0" long.
Q. Each of those 12" 3'-0" pieces would be one solid piece of cork?
A. One solid piece of cork, cemented on the wall.

Q. And how thick?

A. I think two to three inches.

Q. What kind of cement is used in cementing the insulation on to the wall?

A. Portland Cement.

Q. What thickness of cement would be used ordinarily in attaching the cork insulation?

A. About one-half to three-quarters of an inch thick.

128 Q. Do you know whether or not such cement was actually used in putting on the cork insulation on the end of the chip cask or tank room in the Sistersville Brewery in which the opening was left?

A. From its present appearance I should say it was put on in that way.

Q. You are judging from its appearance?

A. Yes.

Q. And not from what you actually know?

A. I didn't see it, as it was covered by cement plastering.

Q. In the opening as provided by you, which you say is ten feet by twelve feet, and allowing for the window, which is three feet six inches by nine feet, how many brick would be used in laying—or filling in that arched opening?

A. About three thousand brick.

Q. That is allowing for the window that is left in the arch?

A. Correct.

Q. I believe you stated that the wall in which that arched opening was left was eighteen inches thick?

A. My recollection is it was. It may have been twenty-two.

Q. How many bricks thick would that be?

A. Four.

Q. Laid sideways?

A. Sideways, yes.

Q. In preparing plans and specifications for Breweries, you always provide for an arched opening in the chip cask or tank room where steel chip casks are to be used, do you not?

A. In nearly all cases; not always.

Q. When do you not do so?

A. When it is inconvenient to do so, and the chip casks are large, then we take them apart in rings and take them in through the doors and set them up when we get them inside.

Q. That is a more expensive way and the chip casks cost more when they are installed in that way, do they not?

A. No, sir.

Q. Are you sure about that?

A. I am sure about that. When they take them apart that way, they are larger.

Q. But it costs more to put up and install the chip casks when they are put up in rings in the Brewery than when they are put up in the factory, does it not?

A. The cost per barrel to us is the same, often less.

Q. You are as sure of that as you are of anything you have testified to here to-day, are you, Mr. Bollinger?

A. Usually they cost less.

Q. And you are as sure of that as anything you testified to here to-day?

A. I am sure of that. I can show you their propositions.

Q. Who did you get the bonds of the Sistersville Brewing Co. from? Did you get them from the Sistersville Brewing Co. direct?

A. No.

Q. Who from?

A. From the trustee.

Q. Had those bonds been previously issued to any one
129 else, or were they issued for the first time to you?

A. They were in the trustee's custody until I took them.

Q. And I believe the Deed of Trust calls for Series A, B, C, D, E, F and G, and you got all of those series direct from John S. Sell, the trustee in the deed of trust?

A. I don't recall the series but I got all the bonds.

Q. You got all the bonds and got them from the trustee?

A. Yes, sir.

Q. Had any interest been detached or separated from the deed of trust when you took them?

A. I think the coupons were all on.

Q. Did you know Jno. S. Sell?

A. Yes.

Q. Where does he reside?

A. In Greensburg.

Q. In what State?

A. Pennsylvania.

Q. Citizen of Pennsylvania, is he?

A. Correct. Banker of Greensburg.

Q. You have seen the arched opening that was afterwards filled up in the wall of the Sistersville Brewing Co., have you?

A. I have.

Q. Are the bricks interlocked on the sides with the wall of the building?

A. Not on the face.

Q. Now, how about the cooling coils or pipes in the chip cask room of the Sistersville Brewing Co. at Sistersville, W. Va.—do they extend across the end of the building or across the ceiling?

A. I do not recall whether they cross the end or not.

Q. Quite frequently those cooling coils and pipes extend across the ceiling of the room, do they not?

A. Across the ceiling? Yes, sir.

Q. And you do not know how they are in the chip cask room of the Sistersville Brewery, at Sistersville, W. Va.?

A. No, I don't recall that.

Q. I believe you testified in relation to an attemporator. In what casks are the attemporators used?

A. Usually in all the chip casks.

Q. The attemporators are used in the chip casks, are they?

A. Yes, sir.

Q. Isn't it a fact, Mr. Bollinger, that the attemporators are used only in the fermenting casks or tanks?

A. It is not a fact.

Q. And you are as sure of that as anything you have testified to here this morning?

A. Why, certainly.

Q. Will you describe the attemporator—what it consists of and what it is constructed of?

A. The attemporator is a system or series of pipes conducting salt brine from the brine tank through a coil that is placed inside of the chip casks for the purpose of attemporating or keeping cool the material inside such cask.

130 Q. What openings, vents or outlets have the chip casks or tanks?

A. When equipped with these coils, the coil is either copper or iron, galvanized, and made in various shapes inside of the chip cask, the two openings running through the shell of such cask, with locked nuts to keep them from leaking; then the pipes conducting this brine are connected therewith.

Q. Are these pipes known as the attemporators constructed in the chip casks or tanks by the manufacturers of the chip casks or tanks?

A. Not always; sometimes.

Q. Do you know whether or not the attemporators in the Sistersville Brewing Co.'s Brewery, at Sistersville, W. Va., are installed in the chip casks or tanks?

A. I do not know, as we did not install the casks.

Q. How large an opening in the chip cask or tank would be necessary to insert or install the attemporators within the tank?

A. The pipes used are usually $1\frac{1}{2}$ to 2 inches in diameter; the hole is just large enough to admit the end of the pipe.

Q. But these pipes are arranged in coils, I understood you to say?

A. Usually only one coil in a tank.

Q. Well, how large an opening would be necessary to install that coil in a tank?

A. In that case, when they use only one coil, it is put in the large man hole, the ends of it then stuck out through the tank and the lock nuts put on. There are two holes, one for each end of this coil. Sometimes they are put in by removing one end of the chip cask and the whole coil slipped down in.

Q. But how large an opening would be necessary—what size, in say inches or yards?

A. As I said, sometimes they are put in the man hole that is on the cask; sometimes they are put in the cask by removing one end of the cask.

Q. Mr. Bollinger, you either don't understand my question, or you are evading it. I am asking you what the size of the opening is; not what the opening is called, but the size of the opening?

A. If they are put in at the top, then the hole is eight feet, because the top is taken off; if it is put in the man hole, then the opening is about twelve inches to fifteen inches.

Q. But what size opening would be necessary?

A. It depends upon the attempurator.

Q. Well, such an attempurator as you have described, of 1½" pipe or coil?

A. It depends on how the attempurator is made.

Q. In what way is the attempurator usually made or constructed?

A. One solid ring.

Q. And that ring extends sometimes entirely around on the inside of the tank?

A. Correct.

Q. And when it is installed that way you have to have the entire top off of the tank in order to install it?

A. Right.

131 Q. I believe you have testified you do not know whether there are any attempulators in the tanks at the Sistersville Brewery, at Sistersville, — Va., or not?

A. I do not know.

Q. You don't know either whether those chip casks or tanks were constructed entirely at the factory and merely set up in the Brewery, or whether they were constructed there and brought to the Brewery in sections?

A. I do not.

Q. The chip casks are also called pressure tanks?

A. Sometimes.

Q. And the object of a pressure tank is to give life to the beer by submitting it to pressure?

A. Yes, sir.

Q. They obtain their name of Chip Casks because of the use of chips used by certain brewers manufacturing the beer?

A. Correct.

Q. Not all Breweries use chips in the manufacture of beer, do they, Mr. Bollinger?

A. I don't know of any brewery that does not use chips.

Q. But if chip casks are not used for the pressure?

A. Why, then, some other tank as a pressure tank is necessary in the manufacture of beer, as they must have pressure.

Q. Now, the beer is taken into the chip casks or tanks from the stock tank, is it not?

A. Correct.

Q. And the stock tank is usually on the floor above the chip tanks?

A. Yes, sir.

Q. And the beer is run from the stock tank into the chip casks or tanks by means of a rubber hose?

A. Yes.

Q. And that rubber hose is screwed on to the stock tank and then screwed on to an opening in the top of the chip cask or tank usually?

A. Usually.

Q. And when the beer is taken out of the chip cask or tank it is also taken out by means of a rubber hose screwed on at the bottom of the tank?

A. Always.

Q. And run from the chip cask or tank into the racker, from which it is filtered?

A. From racker through a filter.

Q. And that is done by a rubber hose connected to a chip cask through racker?

A. Yes, sir.

Q. When the beer is barrelled or bottled for the market, is it barrelled or bottled in the chip cask room or a room outside?

A. Usually in a room called a racking room.

Q. And that is a room usually adjoining the chip cask or tank room?

A. Yes.

Q. And the rubber hose is run from the chip casks or tanks in the chip cask or tank room into the racking room, if there is a racking room separate?

A. Yes.

Q. In an opening 10 by 12, how much of the cork insulation, or how many square feet would be necessary to cover that opening?

132 A. We usually leave the cork off the entire end until after it is bricked in and then put on the cork without any reference to the opening that had been left.

Q. But I am asking you how much cork insulation, in square feet, would be necessary to cover an opening 10 x 12?

A. Multiply ten by twelve—one hundred twenty.

Q. One hundred twenty square feet?

A. Correct.

Q. What would one hundred twenty square feet of cork insulation, such as is used on the Sistersville Brewery, cost?

A. We figured, taking all of our insulation, putting it on in large quantities, shipping in carload lots, twenty-five cents per square foot.

Q. Then one hundred twenty square feet would be something like twenty-seven dollars?

A. Estimated on the basis of carload lots, it would be thirty dollars.

Q. What time or date—what date did you transfer bonds to George W. Hartman?

A. I don't recall.

Q. Have you any data in the office by which you can refresh your recollection on that point?

A. Yes, sir.

Judge JACOBS: Defendants object to the question and answer thereto, because the same is immaterial upon any issue in this case.

A. Our books show the transaction was made May 29th, 1908.

Q. That was just a short time after you made your settlement with the Sistersville Brewing Co., in which you took the bonds and stock in settlement?

A. I don't recall when we made the settlement with the Brewing Company—the exact date.

Q. I believe you have testified that you made the settlement with the Brewing Company in May, 1908. Is that correct?

A. Yes, sir.

Q. Well, I want to get at the date of the settlement with the Sistersville Brewing Company. Can that be done?

A. I don't know the exact date.

Q. Have you anything in the office with which you could refresh your memory and get the date of settlement with the Sistersville Brewing Co.?

A. I think I have.

Q. Will you refer to your records and give us the date on which you made the settlement with the Sistersville Brewing Co.?

A. Agreement signed May 11th.

Q. Was that the date on which the settlement was made?

A. We may have agreed verbally prior to that time.

Q. If you did agree verbally prior to that time, you don't remember it?

A. I do not remember it.

Q. Then, if you traded the bonds to George W. Hartman on May 29th, 1908, that was before the Detroit Steel Cooperage Co. had installed their chip casks or tanks in the Brewery, was it not?

A. I don't recall when they installed their tanks.

Q. Can you state at what stage the erection of the Brewery Building of the Sistersville Brewing Co., at Sistersville, W. Va., was in December 1st, 1906? Was the building erected at that time?

A. I think it was.

Q. Was any of the machinery installed at that time?

A. I do not know.

Q. Was the Brewery completed and in working operation on that date?

A. Not until after the steel cooperage was installed.

Q. And that was sometime in the year 1908.

A. I think so.

Q. Do you know Charles Klaus?

A. I do.

Q. Where does he reside?

A. South Side, Pittsburgh.

Q. Citizen of the State of Pennsylvania?

A. Yes, sir.

Q. Do you know Carl Benz?

A. I have seen the gentleman in the meetings.

Q. Do you know where he resides?

A. I do not know.

Q. Where did you see him?

A. In stockholders' meeting in Dr. Kirk's office.

Q. Stockholders' meeting of what?

A. The Sistersville Brewing Company.

Judge JACOBS: The foregoing question objected to by defendant because immaterial and because in no sense cross-examination.

Q. Do you know Feuchtwanger Bros.?

A. I do.

Judge JACOBS: Same objection.

Q. Where do they reside?

A. At present they have an office in Pittsburg; one in Philadelphia. I do not know where they reside.

Q. Why did you advise the Detroit Steel Cooperage Co. to attach a sight draft to the bill of lading when directing them to ship the tanks to the Sistersville Brewing Company at Sistersville?

A. I do not know.

Q. Was it because you did not regard the Sistersville Brewing Company good financially?

A. I don't recall.

Q. You don't know why you made the suggestion?

A. No, I don't remember.

Mr. KIMBALL: That is all.

134 Redirect examination.

By Judge JACOBS:

Q. Mr. Bollinger, in taking the contract to build the Sistersville Brewery plant, who took the initiative; that is, who brought the Brewing Company and your Company together?

A. H. P. Ecker.

Q. The President of the Brewing Company?

A. Afterwards became President.

Q. Now, a good deal has been said about taking out the wall, removing the tanks, etc. I want to ask you whether it is not possible, from a physical standpoint, to take out an opening anywhere in a brick wall?

A. It is sometimes more convenient than where the hole is in the arch.

Q. That may be on any side of the building or either end of it?

A. Yes, sir; either wall.

Q. You stated, I believe, that you left the cork insulation material there when you quit the building?

A. We did.

Q. Now, in the cellar room—I believe you call the tank room the cellar room, do you not?

A. Yes, sir.

Q. In the cellar room, how far up to wall height is that insulation built?

A. Entirely up to the ceiling.

Q. So you left sufficient material there to insulate that whole end?

A. One end of the building.

Q. And in removing—whether you removed the tanks through what is called archway or through another hole made in the wall, the insulation would have to be removed?

A. It would.

Q. There is necessarily connected with a Brewing plant some machinery, is there not, beside the tanks?

A. Yes, sir. It requires other machinery.

Q. It is possible, is it not, to make an opening any place in the wall to take out any machinery if you must do it.

A. Practically any place in the wall an opening can be made.

Q. And you might go on making openings here and there, taking out pieces of machinery, until you have nothing left in the building, might you not?

A. We frequently have to make openings for installing machinery.

Q. The fact about this Brewery was that the opening was left and afterwards substantially closed?

A. Yes, sir.

Q. Now, when that opening was closed, you may state whether or not the wall and insulation and the cement plastering would be as substantial and complete as the balance of the wall and the insulation and the plastering?

A. In closing any opening we may leave or make to put in machinery or casks, we close it up as neatly as we can, as permanent and as strong and as well as any other part of the building.

135 Q. Now, I believe you have said you don't know whether the attempurator, such as you have spoken of, was installed at the Sistersville plant or not?

A. I do not know.

Q. The attempurator is a coil, is it not?

A. It is a coil.

Q. And the purpose of it is to cool the beer?

A. Keep the beer cold.

Q. And that is done by means of running salt water through the coil of the attempurator?

A. An attempurator is not always used.

Q. Yes, but where it is used, that's the purpose?

A. That's the purpose.

Q. Now, that enters the cask and comes out, does it?

A. One end is for the inflow of the liquid, and the other is for the exit.

Q. Now, how is that connected up with the brine tank?

A. By means of pipes.

Q. Iron or steel pipes.

A. Galvanized iron pipes.

Q. Then, if there is an attempurator in the tanks in the Sistersville Brewing Co. connected with the brine tank, state whether it would be necessary to sever their connection in order to move the tanks?

A. It would be necessary to sever this connection.

Q. How is that connection made with the pipe which connects with the brine tank—by means of a screw, is it, or what?

A. I do not know just the means they employ in the different instances.

Q. But the attempurator goes into the tank and makes a circuit and comes out, and then it is connected with—

A. The two circuit pipes on the outside.

Q. And thus the two circuit pipes are connected either directly or indirectly with the brine tank?

A. With the brine tank or through a pump, cooled by circulation of brine.

Q. I was going to ask you—in order to be effective, or to accomplish the purpose intended, must the brine be kept in circulation?

A. It must.

Q. And it's purpose is to cool the beer?

A. It is; to keep the beer cold.

Q. Is there any particular fixed place where the brine tank is located?

A. There is not.

Q. It may be in one part of the building or in another?

A. Yes, sir.

Q. In the Sistersville Brewery, do you know where it is located, that is, the brine tank?

A. The brine tank there is located in the ice room.

Q. Have you been at the Sistersville Brewery during the process of making beer at any time and seen it in operation?

A. I believe not.

136 Q. How many tanks did you say there were in that place?

A. About one dozen.

Q. State whether or not, if you know, those tanks are filled with beer at the present time?

A. I understand a few of them are filled with beer.

Mr. KIMBALL: Objected to because witness is testifying to what he thinks, not what he knows.

Judge JACOBS: Well, I expect your objection ought to be sustained. That's all, sir.

Recross-examination.

By Mr. KIMBALL:

Q. What is the purpose of the cork insulation being put on the chip cask or tank room?

A. It is put on all of the cellars.

Q. For what purpose?

A. To keep the cold in and the heat out.

Q. In other words, for refrigerating purposes?

A. For refrigerating purposes, yes, sir.

Q. Then the chip cask or tank room in the Sistersville Brewery is refrigerated?

A. It is refrigerated.

Mr. KIMBALL: I believe that is all.

Judge JACOBS: That is all.

An adjournment was then taken to 1:30 P. M.

1:30 P. M.

KONRAD KEIL, a witness of lawful age, being produced on behalf of the defendants, and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Judge Thomas P. Jacobs, counsel for defendants, as follows:

Q. Please state your name?

A. Konrad Keil.

Q. Place of residence?

A. No. 802 Boquet street, McKees Rocks, Pa.

Q. Occupation?

A. Architect.

Q. How long have you practiced the business of Architecture?

A. About nine years.

137 Q. Where?

A. Here in America. Studied in Europe.

Q. What has been the line of your Architecture?

A. In Europe, Civil Engineering. Here breweries.

Q. Did you ever see the Sistersville Brewery?

A. Was never there.

Q. Did you do any work on the plans?

A. I worked on the plans.

Q. What particular portion of the plans did you work on?

A. I made all of the plans.

Q. For whom were you working at the time?

A. Working in Pittsburg for Bollinger Bros.

Q. Do you remember the thickness of the walls of the Brewery?

A. First floor in stock house 17 or 18 inches.

Q. What is the first floor called in a Brewery?

A. There are different building- and different departments in a Brewery: stock house department, racking room department and wash house department. First floor in the stock house is called chip cask room.

Q. What casks are located in the chip cask or tank room?

A. In the chip cask room usually have chip casks or pressure tanks.

Q. What is the purpose of the chip cask?

A. To make the beer.

Q. From what casks is the beer taken to be put on the market?

A. From the chip casks.

Q. The chip casks then are the casks in which the beer is finally matured for market?

A. Yes.

Q. And is there any other beer put in that cask until it has been emptied? You take all of the beer out of that cask before you put any more in?

A. Yes, sir; after it is emptied, you put new beer in.

Q. What is the purpose, Mr. Keil, in the refrigerating lining in the beer cellar?

A. The lining is put in so as to keep the cellar at a certain temperature. In the chip cask room you have to maintain a temperature of thirty-two degrees to make beer right.

Q. What, usually, in providing specifications for a Brewery, what thickness do you specify for insulation.

A. It depends on the wall. The thinner the wall is, the more insulation you have to put in. If it is a thick wall, you can use less insulation. Of course, you have to watch at the same time to get enough refrigerating in the ammonia pipes to keep it at a certain temperature.

Q. State what substances that insulation is made of?

A. Usually make it of asphalt and cork.

Q. Is the insulation conductor of heat and cold?

A. No conductor of heat and cold.

138 Q. How is the insulation put on?

A. Insulation is put on the walls by means of cement mortar and spikes. They usually drive six or ten spikes in wall through insulation and after that, the surface is cemented about $\frac{1}{2}$ " in thickness.

Q. State whether the insulation extends to the ceiling and the floor.

A. All the way up and down. It extends from ceiling down to floor.

Q. How about overhead?

A. Overhead there is usually another cellar and then you don't need it, but in case you don't have another cellar on top, you have to provide new insulation for that.

Q. Do you provide insulation in the second and third stories, etc.?

A. Only on the walls, but on the last one you have to provide additional insulation on top of ceiling.

Q. To use another expression, beer is manufactured downward, isn't it; beginning in the upper story and coming down?

A. Yes, they usually put it first in settling tubs, from there in fermenting tubs, where beer is fermented; from there to stock tubs, where it is aged and from stock tubs to chip casks, where it is finished.

Q. And it is finished off in the bottom cellars.

A. It is finished in the chip cask cellar.

Q. Are then, chip casks below the surface of the ground, necessarily?

A. It don't make any difference at all.

Q. You may state whether or not, it is possible — make beer without the use of chip casks?

A. You have to use chip casks when you go to make beer.

Q. State whether or not the chip casks are a necessary part of a Brewery?

A. Yes.

Q. State whether the chip casks are necessarily used in connection with making and finishing the beer?

A. You have to use chip casks to finish the beer.

Q. And state further if the chip casks were removed by any means out of the Brewery, could you proceed with the manufacture of beer?

A. When you want to remove the chip casks, you have to make an opening in the wall to take them out.

Q. But I say, supposing they are taken out and removed, can you proceed with the manufacture of beer?

A. No, you either must have chip casks or pressure tanks for the last state.

Q. And you say, in making specifications for a Brewery, the Architect specifies chip casks for part of the Brewery?

A. Yes, always. Some people call them pressure tanks. But chip casks are about the same as pressure tanks.

Q. Are you acquainted with steel cooperage?

A. Yes, sir.

Q. Is that used in the present day a good deal?

A. I have seen it several places and have put it in already.

139 Q. How are the steel cooperage tanks put in the Brewery?

A. As a whole tank or in rings. So far as I have seen them, they have always come complete and were put in complete.

Q. Then when put in, what do you do with the opening that has been left for them?

A. You have to find out first the size of the tank and then leave an opening in the wall big enough to admit it. It should be the size of the tank.

Q. Then when you get the tanks in, what do they rest on?

A. Steel cooperage is usually setting on cast iron stands.

Q. What do you use to hold them in place?

A. There are some kind of screws used. You have to turn the screw to fasten them.

Q. After your tanks are all in the cellar, how do you fill up the opening through which they were taken?

A. First, you have to fill up the opening with brick; then the cork insulation; then you put cement plaster on, and then you plaster over it.

Q. Is that wall you build the same thickness as the other wall?

A. Yes.

Q. When your insulation is put on, it is fastened against that wall, is it?

A. Yes; you first put against it a layer of cement, usually drive two spikes into it, to hold it in place; then against that you put cement plaster.

Q. How thick is that cement?

A. Cement plaster is $\frac{1}{2}$ " , sometimes $\frac{3}{4}$ " thick. It varies.

Q. Now, in case you should open that up—tear that down and remove the wall, of what value would the cement and the cork be.

A. When you take that down, it will be nearly useless. You might use some little pieces of the cork after you clean it, but it doesn't seem to pay to do that. You have to throw that away.

Q. Cork is manufactured in squares, isn't it?

A. Not in squares. Oblong pieces, 12" wide, 3'-0" long.

Q. And are you able to cut those to suit any form you desire?

A. Well, you can cut them, yes.

Q. But when loosened from the wall and removed, together with the cement, they are practically useless?

A. Well, when taking out the plaster and cork, you are liable to break them.

Q. In your specifications for a Brewery, usually what is the thickness of the wall of the first story specified?

A. It depends on the height of the story. When you have four stories, it is usually 17 or 18 inches; when you have two stories, it is usually thirteen.

Q. And the thickness of the insulation depends upon the thickness of the wall also?

A. Upon the thickness of wall, yes, and the size of the room.

140 Q. Will you tell us what an attemporator is?

A. An attemporator is a coil of pipe with a copper ring, which is connected to some pipe line.

Q. How is that connected with the brine cask?

A. It is usually some kind of a screw flange connecting two pipes.

Q. Now, suppose you have a dozen tanks and you have an attemporator on each one of them—how is each one connected with the brine cask?

A. You have to make connection from brine tank to the settling tub and then to each tank.

Q. Does the salt water circulate through the attemporator?

A. Yes.

Q. What's the purpose of that?

A. To cool down the material in each tank.

Q. To keep the temperature down?

A. Yes.

Q. And where those attemporators exist, they are of some metallic substance, are they not, in all cases?

A. They don't put them in every tank; some people put them in chip casks and some people don't.

Q. When you use them at all, they are always of metallic substance, aren't they?

A. Yes.

Judge JACOBS: That's all, I believe.

Cross-examination.

By Mr. KIMBALL:

Q. You are the architect who drew the plans for the Sistersville Brewery?

A. Yes.

Q. In the plans prepared by you for that Brewery, you provided an arched opening to take in the chip in the chip casks or tanks, didn't you?

A. Yes, sir.

Q. What size is that opening, as provided by you in the plans?

A. I don't recall. Will have to look up the plans, but think it was a few feet bigger than the size of the tank.

Q. Can you refer to a set of the plans in the office here and refresh your recollection as to that point?

A. Yes, sir.

Q. Will you do so?

A. Yes, sir.

Q. You are now looking at a blue print of the plans of the Sistersville Brewery, Mr. Keil?

A. Yes, sir.

Q. Will you state what is the size of the arch opening as provided by you in those plans for the taking in of the chip casks or tanks?

A. Ten feet wide, thirteen feet high, and the center is fourteen feet high at the center of the arch.

Q. What is the construction of the arch at the top over the opening?

A. It consists of two layers of brick about 9" high.

Q. Do those bricks in the arch stand on end or on side?

A. You can't tell from the plans.

141 Q. How do your plans provide for the sides of that opening?

A. Solid straight up and down side. As it is shown here, it is straight side.

Q. What do your plans provide with reference to a window in that arched opening?

A. The window that they put in when the arch is filled up.

Q. And what would be the size of that window as provided by the plans?

A. Three feet wide by nine feet high.

Q. What is represented by the two parallel lines of dots underneath the window?

A. That is what they call a belt course.

Q. And what do you mean by a belt course?

A. A belt course is a piece of stone usually put in between foundation walls and upper walls.

Q. And the brick construction rests on that?

A. Not exactly. It usually is there for ornamentation.

Q. In the opening such as you provide in the plans, how many bricks, making allowance for the window, would it take to fill up that opening?

A. About three thousand, three hundred and ninety brick.

Q. That is taking into consideration the window?

A. Yes. Of course, it depends on the size of brick they use there.

Q. If the brick should be removed from that opening, you could cut out the cork insulation to the size of the opening on the inside, could you not?

A. Yes, sir.

Q. No damage would result to the Brewery building by taking out the bricks of that arched opening?

A. It wouldn't cause any damage but it would be useless.

Q. It would cause no damage, except to the bricks removed—no damage to the remainder of the brewery?

A. No.

Q. If the bricks should be removed from a side of the Brewery building in which there was no arched opening, or arch constructed,

there might be some danger to the balance of the Brewery, might there not?

A. Yes, sir.

Q. The object of providing for an arched opening is to avoid any possible danger to the remainder of the building, is it not?

A. Yes.

Q. A building usually settles most during the first year or two after its erection, does it not?

A. Yes.

Q. After the first couple of years of construction, there is no settling, is there?

A. The settling is about done.

Q. If the chip casks or tanks should be removed from the Brewery, all that would be necessary to make a complete brewery again would be to buy new chip casks?

A. Yes, sir.

Q. Some Breweries don't use chip casks in the manufacture of beer at all, do they?

A. No, sir.

Q. And in such cases, when chips are not used, the chip casks are merely used for pressure tanks?

A. Yes, sir.

142 Q. But chip casks or pressure tanks are necessary to the complete equipping of a Brewery, are they not?

A. Yes, sir.

Q. In planning Breweries, you usually provide an opening in the plans for taking in the chip casks, don't you?

A. Yes, sir.

Q. And that is never closed up until after the chip casks are installed?

A. No, sir.

Q. And if ever it becomes necessary to remove the chip casks, all that you have to do is to take the bricks out of the arched opening?

A. Yes. At the same time you have to disconnect the tanks from the attemporator lines and brine lines.

Q. The chip casks or tanks used in one Brewery may be used in another?

A. Yes, sir.

Q. Mr. Keil, can you make a calculation of what would be the cost of removing the bricks from the opening as provided for by you in the plans for the Sistersville Brewery and replacing them again?

Judge JACOBS: The defendants object to the foregoing question and any answer thereto because the same is incompetent and immaterial.

A. It will cost sixty-two dollars and twenty cents.

Q. Will you state how your calculation is made up, as you have it on record?

A. It is made up as follows:

2 men take down this wall in 1 day each, @ 2	\$4.00
1 bricklayer, two days, 8 hrs. ea. da., @ 60¢ hr.	9.60
Bricklayer has to have helper for 2 das., \$2 dy.	4.00
Bricklayer has to have cleaner for 2 das. @ \$2 dy.	4.00
140 square feet cork, @ 25¢ a square foot.	35.00
16 square yards of Plaster, @ 35¢ a square yard.	5.60
Total	\$62.20

Judge JACOBS: The foregoing question and answer thereto objected to by the defendants as immaterial and irrelevant.

Q. In making that computation, you have made that calculation on Pittsburg prices and wages, have you?

A. Well, it takes about an average.

Judge JACOBS: Objected to again, for same reason.

Q. And that could be done, could it not, without any damage to the rest of the Brewery building?

A. Yes, sir.

Q. Have you ever been in the Sistersville Brewery?

A. No, sir.

143 Q. You don't know whether the attemporators are in the chip casks in that Brewery, or not?

A. No, sir.

Q. Are the attemporators always put in the chip casks?

A. Not always.

Q. Where are they usually put?

A. Some people want to make sure they keep the temperature the same all the time, and it is a better way to tell it by attemporators than depending on thermometers.

Q. Aren't the attemporators usually put in the fermenting tanks?

A. You have to have them there to show the temperature.

Q. Do you know where the brine tank is located in the Sistersville Brewery?

A. I don't know but think it is located in the ice plant. Am not sure.

Q. If the attemporators are placed in the chip casks or tanks, they are always connected up with a union joint, aren't they? Simply screw on and taken off with a wrench?

A. Am not sure, but think they are usually.

Q. Rather out of your line, is it?

A. Yes, sir.

Q. You don't know whether or not this opening as provided by you in the plans of the Sistersville Brewery, was filled up as specified in the plans or not?

A. I don't know; never have seen the Brewery, so can't tell.

Q. Mr. Keil, the brine tank would not be connected up with the chip casks at all, if the attemporators are not in the chip casks, do you think?

A. Well, if you have attemporators on chip casks, then, of course, it will be connected; but if you do not have, I don't know.

Q. If the attemporators are not in the chip casks, then the brine tank would not be connected up?

A. Yes, it would.

Mr. KIMBALL: That is all.

Redirect examination.

By Judge JACOBS:

Q. Mr. Keil, if you should very tenderly take out all the machinery in the Sistersville Brewery, without breaking it, lay it on the ground, take out the casks, also carefully take down the bricks and lay them around, you might have the material there but you wouldn't have a Brewery any more, would you?

A. Of course there are some pieces that are too big; they have to be taken down in pieces. Then——

Q. But if you should dismantle it quietly and tenderly and lay it down, you might have the material there but no Brewery?

A. You have the material but no Brewery.

Judge JACOBS: I believe that is all.

Mr. KIMBALL: That is all.

144 FRANK REGAN, a witness of lawful age, being produced on behalf of the defendants, and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Judge Thomas P. Jacobs, counsel for defendants, as follows:

Q. State your residence and occupation?

A. Pittsburg. Present occupation is Manufacturing Agent for Brewery and Bottling Machinery.

Q. State whether at any time you have acted as Brewmaster or Assistant Brewmaster, or any occupation in a Brewery plant?

A. I served apprenticeship two years in the brewing trade and afterwards practiced in several plants, to gain practical knowledge of the workings of the different systems; then graduated from the Wahl-Heinius Institute, Chicago, Ill., and served as assistant Brewmaster in a plant that was selling 30,000 barrels and had practical charge of the plant. After that I engaged in the machinery business.

Q. What kind of machinery?

A. Brewery and Bottling Machinery; for a period of eight years.

Q. How many years altogether did you spend as a practical brewery man and including the course you took in the brewery school?

A. About six years.

Q. What is the purpose of the brew-ry school—what line of instruction do they give?

A. An inside study into the theoretical practice of brewing.

Q. Did you say you took a two years' course in that school?

A. No, sir. I served an apprenticeship of two years. The brewery school course extended over six months only.

Q. State whether or not you consider yourself, with your experience, as thoroughly acquainted with the matter of handling and manufacturing beer?

A. I consider that I am, in view of the fact that I only left the business because I secured more lucrative employment.

Q. Will you state what the duties of a Brewmaster are, in general?

A. The brewing and supervision of the beer from the time the materials are delivered into the Brewery until the time it is taken on to the platform.

Q. He is a kind of a boss of the whole concern?

A. Exactly. That is, up to the selling point; he has nothing to do with the selling of same.

Q. In other words, he is superintendent of the whole plant from start to end?

A. In the manufacture of the product, yes, sir.

Q. Are you acquainted with steel cooperage used in Brewery establishments of recent years?

A. Yes. I was employed in one plant where they used steel cooperage—one of the first, by the way, in the country.

145 Q. One of the first in the country?

A. Reel Bros. Co. of Chicago. One of the first that used steel cooperage, that is, among the first.

Q. Now, when steel tanks are used in a Brewery, in what part of the Brewery are they located.

A. Well, in modern plants they are being used for fermenters, stock tubs and chip casks; in fact whichever tank the beer comes in contact with after it leaves the kettle.

Q. Are you acquainted with the Sistersville Brewing Co. plant?

A. I was in the plant twice.

Q. You saw it twice?

A. Yes, sir.

Q. You have been in the City of Sistersville at least twice?

A. I was there twice, yes, sir.

Q. What kind of tanks do they have in that plant?

A. As I remember it, they had steel chip tanks and wooden stock tanks and fermenters.

Q. Where were the steel tanks located?

A. On the first floor; that is on the ground floor.

Q. That is called a cellar, is it not?

A. Yes, sir.

Q. What was your occasion for visiting that Brewery?

A. I had a deal on at the time with the Sistersville Brewing Co. for the filter and the bottling machinery, which I afterward sold them, and I accompanied Dr. Kirk, who was then the President, and one of the Directors, Mr. Klaus I believe his name was, to the plant, looked the place over and laid out our ideas of how the bottling machinery should go in, that I afterwards sold them.

Q. State whether it was necessary to inspect the tankage in order to locate the machinery that you were selling?

A. No, not absolutely necessary. We only figured on a location for the filter and filter mass washer; but we looked into the cellar to see if we had room to place our machinery there, i. e., the filter and the filter mass washer.

Q. It was desirable, therefore, if not absolutely necessary, that you take a view of same?

A. It was, in view of the position we wished to place our filter in.

Q. State whether you afterwards placed the filter?

A. I sold the filter and it was placed there by one of our erecting men. The filter, of course, generally goes in the cellar; in fact, most always goes in the chip cellar.

Q. What else was it you said you sold them?

A. I sold them the bottle soaker, filter and pasteurizing tank; those, of course, only go in the bottling house.

Q. What is the purpose of lining the cellars with cork and with cement?

A. Well, the cork is used as an insulation to retain the cold which is produced by the refrigerating machines; otherwise, the outside atmospheric conditions would have some effect on the cellars.

146 Q. Does that insulation extend from the floor to the ceiling, usually?

A. Yes, sir. My general understanding is that it is placed below the floor levels and runs all over the walls and ceilings, as well as underneath the floors.

Q. It is impervious to heat and cold, is it?

A. Yes, sir.

Q. How thick is it usually?

A. That depends largely on the climate's atmospheric conditions. I don't know as I would be an exact authority on that, but most places I have seen have been about 4" thick of cork, generally laid 2" thick and either pitch or something of that sort between the two layers of cork.

Q. Does the thickness of a wall govern it to any extent?

A. Well, yes, I should think it would. There is generally an air space provided and, of course, the walls would have to be built of sufficient thickness to maintain the weight that is placed on them, and the brick would hardly be very much of an insulation.

Q. But the brick would be somewhat of an insulation?

A. Somewhat, yes.

Q. Is it not a fact that the thicker the brick, the less the insulation may be, within reasonable bounds?

A. Yes, I think so, yes.

Q. I will ask you if it is the purpose and object of the manufacturers of beer to keep it at a low temperature until put on the market?

A. It is absolutely necessary.

Q. Why?

A. Well, for several reasons. Beer rising above certain temperatures is more likely to contamination, and from outside sources, bacteria, etc. It is very hard to handle it if it rises above certain temperatures. It is very hard to bottle it.

Q. It usually is handled at a low temperature?

A. Yes, sir. That is, at a certain temperature which is laid down by fixed facts, which we have found to be correct.

Q. I would ask you if it is better preserved at a low temperature?

A. Yes, sir.

Q. Are you acquainted with what is called an attempurator?

A. Yes, sir.

Q. Will you please describe in your own way its purpose—how it is installed and for what it is used?

A. The attempurators in the chip casks or fermenters?

Q. Well, say the chip casks.

A. The attempurators are placed in the chip casks for the express purpose of cooling beer at certain times when it reaches a certain stage of perfection, and they are usually placed about the center of the tank, and are used for cooling these beers to temperatures which they cannot gain on the outside, that is, through the cellar temperatures.

147 Q. How are those attempurators connected outside of the tank and what are they connected with?

A. They are connected with the brine line.

Q. What is that made of usually?

A. Generally galvanized iron—galvanized iron pipe. The attempurators are generally copper.

Q. And what is the brine line connected with?

A. Sometimes there is an individual brine tank for supplying the attempurators, and sometimes it is connected with the ice tank.

Q. What material is used in the brine line?

A. In reference to what sort of material? Do you mean in connecting the brine to the attempurators?

Q. Yes.

A. Generally galvanized iron pipes.

Q. Where does the brine come from, then; what reservoir?

A. Just as I mentioned—either from the individual brine tank or the ice tank.

Q. How is that kept in circulation?

A. By pump ordinarily.

Q. And how is that pump ordinarily run?

A. Ordinarily by steam.

Q. Is it necessary or not to keep that brine in circulation to have its effect on the beer?

A. It is necessary, yes, sir.

Q. Do they circulate to go through the attempurators more than once?

A. It is generally kept in constant circulation.

Q. Now, while you were at the Sistersville Brewery plant, were you through the different apartments in the building?

A. I looked over the plant, yes, sir. I was invited to do so and saw about all the plant, I think. I was only interested, of course, in the placing of the filter in the chip cellar and the bottling machinery in the bottling department.

Q. State whether or not that Brewery was erected with the purpose and intent of using steel cooperage tanks in it and were they so used?

A. Well, the Brewery was erected as a crozen brewery. It might not have been a necessity to have steel cooperage but they had to have chip casks?

Q. And what kind of casks were those you observed?

A. Those were steel.

Q. Was the Brewery in operation when you saw it?

A. They had been brewing beer, yes, sir, but the beer hadn't been put on the market.

Q. If those casks were removed in any manner from the Brewery, would it be a Brewery any longer?

A. Well, under certain conditions it might be used. If those casks were removed, you could brew beer if you had a carbonating system. The carbonating system would entail a cost as great, if not greater, than the cost of the chip tanks which are now in the plant, as I remember.

148 Q. In fact, after the tanks were removed, whether you made beer or not would depend upon whether you adopted another system?

A. Yes, sir. You could make beer if you adopted another system. You could put beer through certain portion of manufacture, but you couldn't put it on the market unless you adopted another system to finish it.

Q. So you would either have to have these tanks or in case of their removal, would have to adopt another system and install it?

A. Yes, sir.

Q. Did you observe whether or not there are attemporators connected with that Brewery?

A. I don't recall whether there were or not.

Q. If you use brine for the purpose of keeping the temperature down, you must use attemporators, must you not?

A. Oh, yes, without a question.

Q. You couldn't use brine for that purpose without attemporators?

A. No, sir.

Q. So you might remove the chip casks from that Brewery and install another system and have a Brewery, might you?

A. Yes.

Q. But it would not be the same Brewery that is there now, would it?

A. No, it most assuredly would not be.

Q. And if the steel tanks that were in that Brewery when you saw same were removed, it would cease to be a Brewery unless some other system was installed?

A. Yes, sir.

Q. Do you know about the bunging apparatus in that Brewery?

A. Yes, sir.

Q. How do you come to know about that?

A. Well, I saw it; that is, I saw the controlling factors of the bunging apparatus and I know that it is impossible to operate a Brewery without a bunging apparatus.

Q. Now, tell us please, because the court may not know, what a bunging apparatus is?

A. Well, the most concise manner is: the bunging apparatus is an apparatus for controlling the pressures on the chip casks.

Q. I want to ask you at this time whether there is any danger of explosion of gases if not kept under proper control?

A. Yes, sir.

Q. What effect is that bunging apparatus on the control?

A. It equalizes the pressure on the tanks.

Q. Would ask you if, to that extent, it relieves the tanks of danger?

A. It does.

Q. How is the bunging apparatus of that plant connected up?

A. It is connected with the chip casks, as it is in every plant.

Q. And by what kind of apparatus or means?

A. The pipes are generally strung through the center of the aisle and the tanks are connected to the piping.

149 Q. Metallic piping?

A. Frequently, and frequently rubber hose.

Q. What kind of connections are in this particular Brewery at Sistersville?

A. I don't recall.

Q. But you do remember the fact of the bunging apparatus being installed?

A. Yes, sir. The fact was that the bunging apparatus was in the office the people generally are in, and I had my dealing with people in this office and saw it there.

Q. How long does it take to get beer ready for market?

A. Three to five months, the ordinary beers. The better class of beers—in fact, all class of beers are put on the market in three to five months from brewing date.

Q. During what portion of that time is the bunging apparatus used?

A. Well, the beer is generally in the chip casks about three weeks to four and five weeks, very rarely less than that, and the beer is crozened as soon as it is let down into the chip casks and as it raises a certain amount of pressure, it is on the bunging apparatus. Of course, the beer can be left in the chip casks longer than that, but the manufacturer does not want it to be there longer than that; he wants to realize something on his previous investment.

Q. So you say, from your knowledge and experience, that the Sistersville Brewery plant, if it were deprived of these steel cooperage tanks, would have to be remodeled for some other system?

A. Well, I don't know as it would really have to be remodeled. There would have to be some other system introduced if it were deprived of those chip casks.

Q. It would not be the same plant?

A. No, sir.

Q. And to remove the chip casks as you saw them would be to destroy the integrity of the plant?

A. It would change the entire method of manufacture—that is not the entire method of manufacture, but the method of finishing beer.

Q. The fact is that beer is finished in the chip tanks?

A. Yes, sir.

Q. And sold from the chip tanks, is it?

A. From the chip tanks it is pumped through the filter to the racking machine and put in the trade packages.

Judge JACOBS: I believe that is all.

Cross-examination.

By Mr. KIMBALL:

Q. If the chip casks or tanks are removed, they could be replaced by other tanks or casks, couldn't they?

A. Yes, they could be.

150 Q. That wouldn't necessitate a change in the manufacture of the beer?

A. No, not in the manufacture of the beer. But you would have to break down a wall that was put up there as a permanent wall and there is always danger in doing that in any large building.

Q. But usually there is an arched opening left, isn't there, to take the tanks in?

A. To take the tanks in, yes, sir.

Q. Well, if the bricks by which that opening was filled up are removed, you could take the chip casks out and replace by other chip casks, couldn't you?

A. Well, I guess it could be done, but it would only be useless expense.

Q. When was it you were in the Sistersville Brewery—you stated you were there twice—when was it?

A. I was there twice, along in the summer I think of 1908 and in the spring of 1909. I wouldn't be exactly positive. I form my ideas of the time from the fact that I made a change in concerns in July previous to that and believe the first time I was there was some time in 1908.

Q. On both occasions that you were there, were the chip casks in the chip cask room in the Sistersville Brewery?

A. Yes, sir. To be more exact, the first time they weren't all there; they were just putting in the last tank the first time, and they were bricking up the wall. The last time they were all there.

Q. What do you mean by "they were bricking up the wall"?

A. They were filling in the opening left for these tanks.

Q. There was an arched opening there to bring the tanks in?

A. I don't recollect but suppose there was.

Q. These chip tanks, if removed, could be used in almost any other Brewery?

A. Well, if they were not too large or too small, I suppose they could. They couldn't be used in most any other Brewery. A room would have to be designed specially to receive them.

Q. And if they were removed and other chip tanks placed in the Brewery, the manufacture of beer could go on the same as it was prior to the removal?

A. Yes, no doubt it could, but you can readily realize the fact that if the beer were allowed to stand in the storage tanks until such removal had taken place, it wouldn't be worth anything; on the con-

trary, the ice machine would have to work overtime to supply the proper refrigeration to keep the beer in the stock cellar as cold as it should be kept, and the Brewing Co. would be deprived of being able to make sales while these tanks were being removed.

Q. You don't know whether or not the Sistersville Brewery has always been an active Brewery since you were there?

A. I don't know.

151 Q. You don't know whether there were attemporators in the chip casks or tanks in the Sistersville Brewery, do you?

A. No, I don't recall.

Q. Is the filter in use in the Sistersville Brewery in the chip cask room.

A. It was. Is yet to the best of my knowledge, because it is the most advantageous place to put it.

Q. Do you know about the method of the insulation in the chip cask room in the Sistersville Brewery?

A. No, not in that particular plant. I have a general idea of the method employed in various plants.

Q. But you don't know the method used in that particular plant?

A. No, I don't know.

Q. The attemporators are connected with the brine lines with a union joint, are they not—that you disconnect with a wrench?

A. Not of a necessity. They could be, of course, but not of a necessity.

Q. How are they usually connected?

A. They are usually connected with an elbow. They could be taken apart just the same as if you knocked the chimney off of a Brewery.

Q. After the attemporators are connected up with the brine lines are they ever disconnected?

A. Only if something might happen to the pipes—for instance, when they are worn.

Q. But they can be disconnected?

A. Yes, they can.

Q. You said the Brewery would not be a Brewery if the chip casks or tanks would be removed. What do you mean by that?

A. Well, anything that is incomplete is not complete. Unless there would be some other system installed or other chip casks put in, it would not be a Brewery.

Q. I am asking you what it would be if the chip casks or tanks were removed. What would you call it?

A. I don't know what you would call it. You might call it a building that had been erected for the purpose of a Brewery if it has been completed.

Q. It wouldn't be a Brewery unless it was in such condition that you could finish the beer?

A. No, sir.

Q. Is the bunging apparatus always connected with the chip casks or tanks—I mean, is it continuously connected?

A. Generally permanent, to the extent of course that if the pipes would be worn out or anything of that sort, it can be replaced, just

as any other pipe in the Brewery is, either for refrigerating purposes of anything else.

Q. Isn't it only connected with the chip casks or tanks when the process of bottling or packing the beer for bottling is in process?

A. No, sir. The beer is supposed to be a finished product when it is bottled, and the chip casks are connected with the bunging apparatus as soon as the beer is crozened.

Q. Then it is only connected as soon as the beer is crozened?

A. Yes, sir.

152 Q. How is it connected to the chip tanks?

A. As I said before, either by pipes or it may be by hose.

Q. How it is connected in the Sistersville Brewery?

A. That I don't recall. I only saw the bunging apparatus in the office.

Q. If a rubber hose is used, how is the hose connected in the chip tanks?

A. It is generally fastened to a two-way valve at the top, and there is a spigot in the valve.

Q. Screwed on?

A. Yes, naturally.

Q. How is it connected to the bunging apparatus?

A. The pipes generally run through the center of the aisle and they are connected with a regulating apparatus some place where the Brewmaster can get at them to control them; and a rubber hose screwed to those also at times.

Q. You don't know whether a rubber hose was used in the Sistersville Brewery or not?

A. No, I do not.

Mr. KIMBALL: That is all.

Redirect examination.

By Judge JACOBS:

Q. Suppose there was something like 1,200 barrels of beer in those chip casks in the Sistersville Brewery. How would that affect the power to remove the casks?

A. Well, if the beer were in the chip casks, they couldn't be removed; that is, they could be but it would be a very delicate operation and it, in all probability, would spoil the beer.

Q. You would have to remove the casks, beer and all, would you?

A. Well, the beer could be racked if it were finished.

Q. There are different sizes of chip casks, are there not?

A. Yes, sir.

Q. In preparing the plans and specifications for a Brewery, I could ask you to state whether or not the size and quality of the chip casks are also specified?

A. Yes, sir.

Q. So the chip casks specified in one Brewery could not necessarily be used in another Brewery for which they are not specified?

A. They could be, provided there was sufficient height and width to receive them.

Q. But that would simply happen so, would it not?

A. Yes, sir.

Judge JACOBS: I believe that is all.

153 Recross-examination.

By Mr. KIMBALL:

Q. Mr. Regan, I would like to have you explain the meaning of racking beer—want a meaning of the word racking.

A. Racking as applied to beer, is a process of putting the beer into trade packages, either through what is known as a racking machine or through the old methods of the Schleudt.

Q. And by trade packages you mean?

A. The bottles—no, not the bottles—the kegs or barrels.

Q. And you say the beer is generally racked from the *bottles* into the kegs or barrels in the separate departments—so it is simply the process of filling barrels or kegs from the chips casks or tanks?

A. Yes, sir.

Mr. KIMBALL: That is all.

Redirect examination.

By Judge JACOBS:

Q. When the beer is racked and put into these packages, is it put in those packages under pressure or not?

A. Yes, sir.

Q. And it remains so until used, I believe?

A. Yes, sir.

LOUIS MEYERS, a witness of lawful age, being produced on behalf of the defendants, and being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by Judge Thomas P. Jacobs counsel for the defendants, as follows:

Q. Mr. Meyers, where do you reside and what is your occupation?

A. I live in Sharpsburg, Pa. Occupation, Brewmaster.

Q. How long have you been in that business?

A. I am over thirty years in the business and twenty years brewmaster.

Q. What particular place are you Brewmaster in at the present time?

A. Fort Pitt Brewing Co.

Q. Will you tell us what are the duties of a Brewmaster—what his business is—what he has to do about the Brewery?

A. Make the beer.

Q. All the way through from beginning to end?

A. All the way through, from the beginning to the end.

Q. He is the boss of the works?

A. Yes, sir.

Q. Have you ever used what is known as a steel tank?

A. No, sir.

154 Q. What tanks have you generally used as chip tanks?

A. Wooden ones.

Q. What is the use and purpose of the chip tank?

A. It is used to finish beer.

Q. And after the beer has gone through all the other processes, it is finished at the chip tanks?

A. Yes, sir; it is the last part.

Q. How do you get the beer from the chip tanks into barrels and kegs?

A. Through the filter and racker.

Q. State if you keep the chip tanks under a low degree of pressure or otherwise?

A. Well, about 34 or 35 degrees.

Q. Why is that?

A. Well, it ought to have the same pressure and the same temperature when the beer goes out—at the finish of the beer.

Q. You may state whether or not the chip tanks are a part of a Brewery?

A. Yes, sir.

Q. And in what cellar do you keep them?

A. The lower cellar.

Q. And you say in those chip tanks, the beer gets its final finish?

A. Yes, sir.

Judge JACOBS: That is all, sir.

Cross-examination.

By Mr. KIMBALL:

Q. These chip casks are also called pressure tanks, aren't they?

A. Yes, sir.

Q. And the Brewery you are engaged in now—they use wooden tanks instead of steel tanks, do they not?

A. Yes, sir.

Q. If the chip tanks or pressure tanks were taken out of a Brewery, all you would have to do to complete your Brewery would be to put in other chip or pressure tanks to take their place?

A. You mean to remove it from the chip cask to—

Q. I asked you if the chip casks or tanks were taken out of a Brewery, other chip casks or tanks could be put back in their place, couldn't they?

A. I don't see why. It would only be unnecessary expense.

Q. But it could be done, couldn't it?

A. I guess so.

Q. Are the wooden chip tanks as satisfactory as the steel chip casks or tanks?

A. Well, that is a question for some Brewmasters. I wouldn't have a steel tank for my part. I would sooner have a wooden one. Some of them use steel casks.

Q. But so far as you are concerned, you would rather have a wooden chip tank?

- A. Yes, sir.
- 155 Q. Do you use chips in the beer you manufacture?
A. Yes, sir.
- Q. Do all brewers use chips in manufacturing beer?
A. Pretty near all.
- Q. But some don't?
A. Very few of them don't. Most of them have to use chips.
- Q. But some of them don't?
A. I think so. Very few.
- Q. The attemporators are usually put in the fermenting tanks, aren't they, Mr. Meyer?
A. Yes, sir.
- Q. Are they ever put in the chip tanks?
A. I never had attemporators in chip casks.
- Q. You were never in the Brewery at Sistersville, were you?
A. No, sir.
- Q. Why do you put the attemporators in the fermenting tanks?
A. Well, to keep the fermentation and dry temperature from cooling off.
- Q. The chip cask or tank room is always refrigerated, is it not?
A. Yes, sir.
- Q. That is for the purpose of keeping the beer in the chip casks cool, is it?
A. Yes, sir.
- Q. The beer, when it is in the chip casks or tanks, is put under pressure, isn't it?
A. Yes, sir.
- Q. And that is to give it life, isn't it?
A. Yes, sir.
- Q. And from the chip tanks, it is run into the trade packages?
A. From the chip casks it runs to the filter and to the racker, and is racked off into barrels and kegs.
- Q. What do you use to run the beer from chip casks. A rubber hose or an iron pipe?
A. A rubber hose.
- Q. You use a rubber hose?
A. Yes, sir.
- Q. How is that rubber hose connected to the chip casks—is it screwed on or permanently attached?
A. It is screwed on.
- Q. And when you are through racking you unscrew your rubber hose?
A. Yes, sir, unscrew it.
- Q. The rubber hose is also screwed to the racker, isn't it?
A. The same way, yes, sir.
- Q. And when you are through racking, you unscrew the rubber hose from the racker, is that right?
A. Yes, sir.
- Q. Then the connection between the chip casks and the racker is a temporary connection, isn't it?

A. Temporary, yes, sir.

Q. Did you ever see attemporators used in the chip casks?

A. I think I did.

Q. Where?

A. Well, I can't remember. I guess it was in Philadelphia, in a plant there. I am not sure.

Q. In how many Breweries was that?

A. That was long ago. I can't remember in how many Breweries. Have seen it in only one.

156 Q. And how were the attemporators connected with the brine lines there?

A. I can't remember that any more.

Q. Well, how do you connect the attemporators that you have in the fermenting tank to your brine lines?

A. By pipes or hose.

Q. How are the pipes connected—are they connected by a union joint screwed on?

A. The pipes come straight from the pump up.

Q. And connect on to the attemporators by union joint?

A. Yes, sir.

Q. And that joint can be unscrewed with a wrench?

A. Yes, sir.

Q. Why don't you use steel chip casks or tanks?

A. Well, I have never been in position to use them; can't say anything about steel tanks.

Q. Don't you like them as well as the wooden chip tank?

A. I have always used wooden ones; had good success with them.

Mr. KIMBALL: I guess that it all.

Redirect examination.

By Judge JACOBS:

Q. Have you in your Brewery a bunging apparatus?

A. Yes, sir. In every one I have worked in.

Q. What do you use it for?

A. To regulate the pressure.

Judge JACOBS: That is all, sir.

Recross-examination.

By Mr. KIMBALL:

Q. Is the bunging apparatus connected with the chip casks?

A. Yes, sir.

Q. How is that connected—by rubber hose or otherwise?

A. A small piece of hose from top of cask to pipe line.

Q. And how is that hose connected with the tank—screwed on or otherwise?

A. Screwed on.

Q. And how is it connected to the bunging apparatus?

A. Screwed on.

Q. And all you have to do to that is to unscrew it?

A. Yes, sir.

Mr. KIMBALL: I believe that is all, sir.

Judge JACOBS: That is all.

157 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

I, A. M. Steen, Notary Public in and for said County and State, do hereby certify that the above witnesses—Sidney W. Bollinger, Konrad Keil, Frank Regan and Louis Meyers, were by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that their depositions were taken down stenographically by Blanche M. Dunne, in the presence of said witnesses, respectively, and in the presence of counsel for the plaintiff and counsel for the defendants, and said stenographic notes were then transcribed by said Blanche M. Dunne into English; that the signatures of the witnesses to said depositions were waived by agreement of counsel; and that said depositions were taken pursuant to the attached stipulation and agreement of counsel for the respective parties to said cause, at the office of Bollinger Bros., 925 Fulton Building, Pittsburgh, Pa., on the 14th day of February, A. D., 1911, between the hours of 10:00 o'clock A. M. and 4:00 P. M.; that the parties were represented at the taking of said depositions by their respective counsel as set forth; that the exhibit recited was offered in evidence and marked as specifically noted in the foregoing depositions; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand and official seal this 21st day of February, 1911.

[SEAL.]

A. M. STEIN,
Notary Public.

My appointment dated Jan. 27, 1910.

My commission expires end of next session of Senate.

(Here follows blue print marked page 158.)

EXHIBIT "A".

FLOOR LINE OF STOCK TUB CELLAR

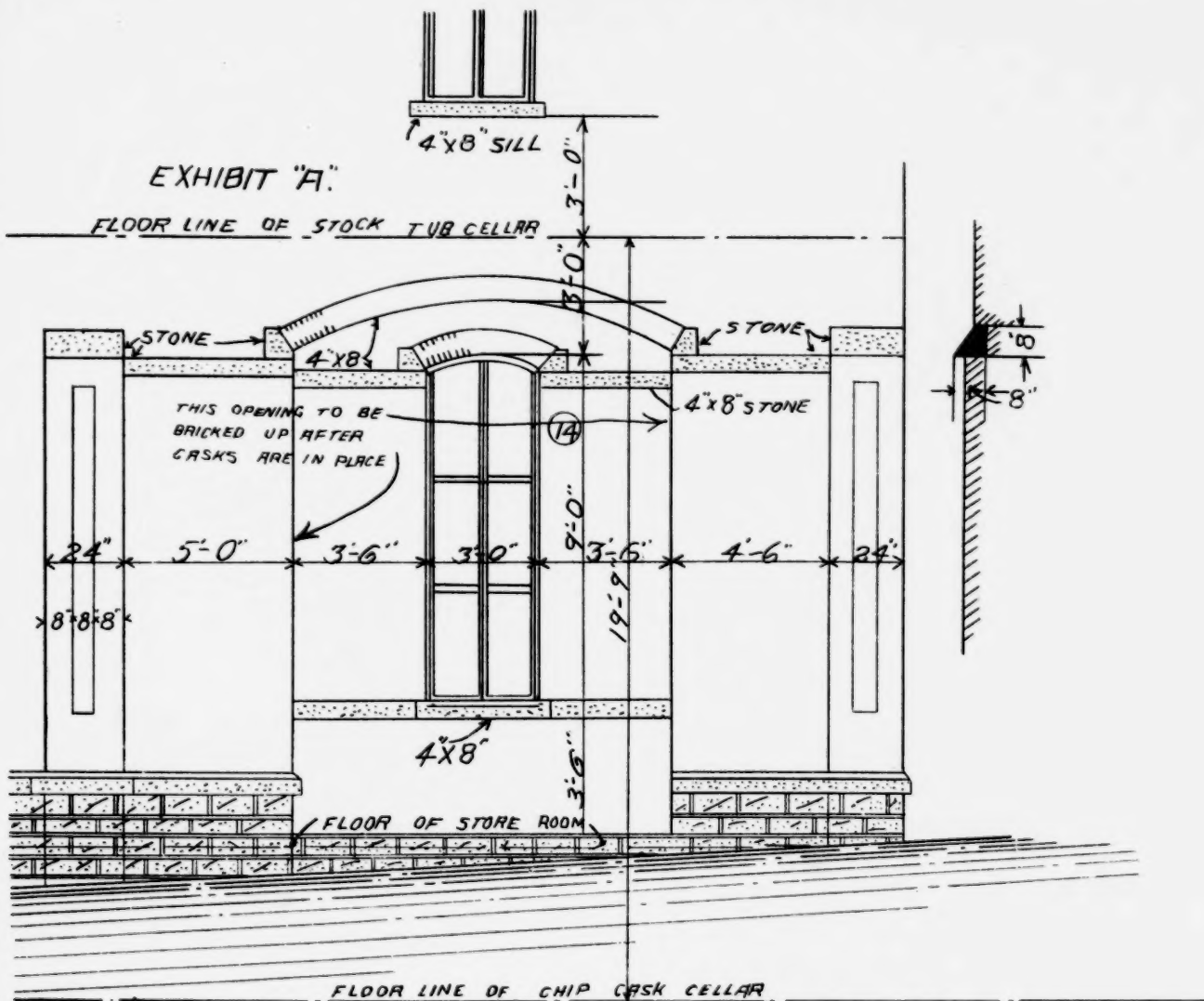


EXHIBIT "A"

W. H. D. Wadings

159

Depositions on Behalf of Plaintiff.

Filed May 2, 1911.

In the Circuit Court of the United States for the Northern District
of West Virginia.

DETROIT STEEL COOPERAGE COMPANY, a Corporation, Plaintiff,
vs.

SISTERSVILLE BREWING COMPANY, a Corporation; GEORGE W.
HARTMAN, and BOLLINGER BROTHERS et al., Defendant.

Depositions of witnesses taken before me, George F. Durham, a Notary Public in and for the County of Tyler, and State of West Virginia, at the offices of Kimball and Sugden, in the Thistle Building, Sistersville, West Virginia, March 29th, 1911, to be read in evidence in a certain suit in equity pending in the Circuit Court of the United States for the Northern District of West Virginia, in which the Detroit Steel Cooperage Company, a corporation, is plaintiff, and the Sistersville Brewing Company, a corporation, et al., are defendants, on behalf of said plaintiff.

Appearances:

George M. Hoffheimer, Esq., Charles N. Kimball, and Walter S. Sugden, Esq., on behalf of the plaintiff.

T. P. Jacobs, Esq., J. H. McCoy, Esq., and A. G. Swiger, Esq., for the defendants, Sistersville Brewing Company, George W. Hartman, Bollinger Brothers, et al.

It is agreed by and between counsel that the depositions of said witnesses be taken stenographically by F. H. Mayne, stenographer, and then transcribed into typewriting; and that said depositions are to be taken pursuant to the attached agreement between solicitors for the plaintiff and solicitors for the defendant.

C. R. KERR, a witness of lawful age, being first duly sworn, deposes and says as follows:

Direct examination.

By CHARLES N. KIMBALL, Esq.:

Q. State your name, age, residence and occupation?

A. C. R. Kerr; residence Sistersville, W. Va.; age, forty-four (44) and occupation photographer.

160 Q. How long have you been following the occupation or profession of a photographer, Mr. Kerr?

A. Thirty years.

Q. How long have you been following that business in Sistersville?

A. A little over fifteen years; about fifteen years.

Q. Are you familiar with the building known as the brewing building of the Sistersville Brewing Company, in Sistersville?

A. I am.

Q. State whether, or not, you have taken any pictures or photograph representations of the brewing building, or any portion thereof?

A. Well, I started in photographing this building from the beginning of the foundation and kept on until its completion, at my own expense; the last work I done photographing the brewing building was Monday, the 27th of March, 1911.

Q. What portion or part of the brewing building did you make photographs of on Monday, the 27th of March?

A. I made one photograph of the bricked in arch on the south-east corner of the brewery on Carter street, close to Wells street.

Q. I hand you here a photograph and ask you if that is the photograph that you took from the position that you have just mentioned?

A. This is the first one I photographed—you might label this as No. 1; No. 1 picture was taken on Carter street looking towards the brewery.

Q. And at what portion of the wall?

A. Of the wall showing the bricked in arch.

Q. I will ask you if you will file the photograph of the bricked in arch, which you have numbered as C. R. Kerr No. 1, as a part of your deposition in this case?

A. I will file this photograph marked C. R. Kerr No. 1, yes, sir.

Q. You may state whether, or not, exhibit C. R. Kerr No. 1 is a true, correct and accurate representation of that portion of the wall of the brewing building of the Sistersville Brewing Company in which is located the bricked in arch on Carter street?

A. It is.

Q. That bricked in or filled in arch contains a window down the centre?

A. Yes, sir.

Q. Did you take any other photograph or picture of any part of the brewing building beside No. 1?

A. Yes, sir, I took this picture which I will mark C. R. Kerr No. 2.

Q. From what point or position did you take No. 2?

A. This was taken from a point to show both sides of the brewery; that would be the south and east sides of the brewery close to Wells street.

Q. Does that picture also show the bricked in or filled in arch?

A. Yes, sir.

Q. You may state whether, or not, photograph C. R. Kerr No. 2, is a correct, true and accurate representation of the portions of the south and east side of the Sistersville Brewing Company, shown in the picture?

161 A. It is.

Q. Will you file photograph C. R. Kerr No. 2 just referred to by you as a part of your deposition in this case?

A. I will.

Q. In photograph C. R. Kerr No. 2, please state if you know the name of the paved street shown in the lower foreground of the picture?

A. Known as Carter street.

Q. And is that the same street that is shown in the lower foreground of photograph C. R. Kerr No. 1?

A. Yes, sir, Carter street.

Q. And what corner of the brewing building is shown in exhibit C. R. Kerr No. 2?

A. The south east corner.

Q. Mr. Kerr, you may state at whose request, or instance, these photographs were taken by you?

A. Kimball and Sugden.

And further this deponent saith not.

ALBERT BURKART, a witness of lawful age, being first duly sworn, deposes and says as follows:

Direct examination.

By CHARLES N. KIMBALL, Esq.:

Q. State your name, age, residence and occupation?

A. Albert Burkart; Columbus, Franklin County, Ohio; forty-eight; general contractor.

Q. Mr. Burkart, where did you live prior to going to Columbus, Ohio?

A. New Martinsville, West Virginia.

Q. How long did you live at New Martinsville, West Virginia?

A. Well, I was there twelve years but moved my family there the second of January, 1900.

Q. But you lived there about twelve years?

A. Yes, sir I went there in the spring of 1898—thirteen years I was there.

Q. What, if anything, did you have to do with the erection or building of the plant of the Sistersville Brewing Company, in Sistersville, West Virginia?

A. Well, I was sub-contractor under Bollinger Bros., general contractors.

Q. What did your sub-contract provide for your doing on your part?

A. For doing all of the brick work.

Q. Did you do all of the brick work on the buildings of the Sistersville Brewing Company, in Sistersville?

A. Yes, sir.

Q. When did you begin?

A. Well, as near as I can recall it was in October, 1905.

Q. Had any work been done towards erecting the building when you began work in October, 1905?

A. Yes, sir, the foundation was almost completed.

Q. When did you complete the brick work and building of the Sistersville Brewing Company?

A. Well, I completed the building proper about April, 1906.

Q. After completing the work proper in April, 1906, did you do any further work connected with the brewing building?

A. Yes, sir, I think that was in the summer of 1908.

Q. What did you do at that time?

A. Why I walled up the door or opening left for the tanks; I do not know whether that is the south or west end, or not, of that building.

Q. Can you state what corner of the brewing building that opening was located with reference to the cardinal points of the compass?

A. Well on the southeast—it is near the southeast corner; it wouldn't be on any corner.

Q. In that part of the building known as the stock building?

A. Yes, sir.

Q. What sort or kind of an opening was it you walled up—a regular opening or an arch?

A. It was an arch opening.

Q. In building and constructing the brewery, an arch opening had been provided, had it not?

A. Yes, sir.

Q. Was that left according to the plans and specifications of the architect?

A. Yes, sir.

Q. I will here show you a blue print, filed with the deposition of S. W. Bollinger and marked exhibit A, with S. W. Bollinger and ask you if that is a true and correct representation of the arch opening as provided in the plans and specifications by which you went in erecting the brewery building?

A. A. Well, it is as near as I can tell; I do not think this stone belt was put in there; my recollection is they weren't put in.

Q. By stone belt you mean the belt course represented on both sides of the window near the top and the belt course represented across the width of the arch underneath the window sill?

A. On a line with the window sill.

Q. As a matter of fact, I will ask you if the belt course represented on a line with the window sill was not dropped down even to and level with the belt course above the foundation?

A. Yes, sir, I say that.

Q. And you say that arch was left open in the brewery building when it was completed according to the plans and specifications of the architect?

A. Well, according to the specifications but the plan there is somewhat changed.

Q. But the arch was left open?

A. Yes, sir, according to the plan.

Q. You say that the brewery building was completed in April, 1906,—you may state how long the brewery building stood
163 with the arch which was left for the purpose of taking in the tanks?

A. Well that stood about two years nine months, as near as I can recollect.

Q. You have had considerable experience in building and erecting buildings have you not?

A. Yes, sir.

Q. You may state during what period of the life of a building does the settling occur?

A. Well, that depends, but a building of this structure would by the first eighteen months show the settlement.

Q. Then all of the settling that would occur in this brewery building would have occurred and taken place before the arch was walled up, would it not?

A. Why, yes, in my judgment, it would.

Q. You may state what kind of mortar or material was used in the laying of the bricks when you filled up that arch opening?

A. Well, as near as I can recollect it was lime and sand mortar with a small quantity of cement mixed with the mortar.

Q. What kind of brick were used in filling up the arch?

A. Good shale brick.

Q. In filling up the arch you left a window in the center of the arch, as provided in the plans and specifications?

A. We walled in the window.

Q. You do not mean to say you filled up the window—you left the window?

A. We placed a window in there as we built it up.

Q. Can you state the size of that window?

A. No, I cannot.

Q. Can you state that from the blue print of the arch opening marked exhibit A. S. W. Bollinger?

A. No, I could not.

Q. You may state whether, or not, in bricking up the arched opening the bricks were interlocked with the wall of the building on each side of the arched opening?

A. Not to my recollection.

Q. Were the bricks interlocked with the bricks in the wall of the building on each side of the arched opening either on the face of the wall or inside of the wall, or any other place?

A. No, they were not.

Q. I here show you a photograph marked C. R. Kerr exhibit No. 1, and ask you if that is a correct likeness of the arched opening as walled up by you in August, 1908.

A. Yes, sir.

Q. Do you know into what room or portion of the brewing building that arch opening opens into?

A. I know it opens into that tank room—I forget what room they call it.

Q. Is that the room called the chip casks, or the tank room?

A. Chip casks or the tank room.

164 Q. When you walled up that arch opening had the steel chip casks or tanks been placed?

A. They were in there; as to being placed I couldn't say.

Q. But they were in the room?

A. Yes, sir, they were in the building, or in the room.

Q. I here show you a photograph marked exhibit C. R. Kerr No. 2, and ask you if that is a correct representation of that portion of the building showing the walled up arch, which was walled up by you?

A. Yes, sir.

Q. I will ask you Mr. Burkhart if the brick filling of that arched opening supports any weight of the brewery wall?

A. No, sir.

Q. I will ask you to state what is the difference in the construction of the arched opening walled up by you and the construction of the arches over the window, as shown in the photograph marked C. R. Kerr exhibit No. 2?

A. Well, probably there is no difference.

Q. Where, or on what portion of the wall, does the weight of the brewery building over the arched opening rest?

A. The bearing would come on either side of the opening with the pressure about almost forty-five degrees on an angle with the building.

Q. As far as the support of the brewery wall is concerned, the arched opening could as well be filled up by wooden doors, could it not?

A. Yes, sir, by wooden doors just as well.

Q. When you say that the weight comes on both sides of the arched opening, do you mean that the weight rests on the opening—on the main wall?

A. Main wall.

Q. On each side of the arched opening?

A. Yes, sir.

Q. Was the inside of the arched opening, as walled up by you plastered or cemented or covered with any other substance to your knowledge?

A. Not to my knowledge, no.

Q. State whether or not the bricks could be taken out of that arched opening without damage or injury to the rest of the brewery building?

A. Yes, sir, they could.

Q. What would be the effect, if you know, on the rest of the brewery building by taking out the brick filling up the arched opening?

A. Well, there wouldn't be any effect whatever on the main building; no more effect than there would have been on the building before it was in.

Q. Can you state what amount of brick or material was used in filling up and walling up of the arched opening?

A. Yes, sir, about 2,255 brick.

Q. You may state whether or not, the conditions are different at this time than they were at the time you filled in the arched opening, as to the material used in filling in the arch?

A. Well, about the same, as near as I can tell.

165 Q. You may state whether the arch as walled in by you is in the same condition at this time as it was when you walled it in?

A. About so.

Q. In order to open up that arch again, what would have to be done?

A. Why just to tear out the brick that has been put in there—tear them out; there is no binding in the main wall and it would be an easy matter.

Q. By whom could that be done?

A. Why by a brick mason and an ordinary laborer.

Q. Would a skilled brick mason be necessary to take the brick out of that arched opening?

A. No, sir.

Q. What would be necessary after the brick had been taken out of the arched opening to put the brick back and place the arched opening in the same condition it is at the present time?

A. Well, it would require a mason and a laborer combined.

Q. Are you able to make an estimate of the time and expense of taking the brick out of the arched opening and relaying them back in the opening and placing the arched opening in the same condition that it now is?

A. Yes, sir.

Q. I wish you would take a pencil and make such calculation?

WITNESS: Do you want it calculated right off?

Mr. KIMBALL: Yes, sir.

WITNESS: Would you want it itemized?

Mr. KIMBALL: Yes, sir.

A. I will start with tearing out the wall—

Labor.....	10 hours	\$2.00
Cleaning brick, labor.....	15 "	3.00
Mason, rebuilding.....	18 "	10.80
Helper for mason.....	18 "	4.50
Lime and cement.....		4.00
Sand		1.75
Carting away rubbish (about a load of rubbish there would be there).....		1.00
Contractor's profit.....		10.00
Total		\$37.05

Q. The total cost then of taking the brick out of the arched opening and relaying them again, according to your estimate, would be \$37.05?

A. Yes, sir.

166 Q. Would any new brick be required in re-walling or re-filling the arched opening after taking the brick out?

A. About two hundred you can count for breakage.

Q. Have you allowed for any brick in your calculation?

A. No, I haven't.

Q. Will you do so?

A. Two hundred brick, \$3.00, making a sum total of \$40.05.

Q. At what price by the thousand did you estimate the brick in making the calculation on the two hundred brick used.

A. At \$15.00.

Q. How long have you been engaged in the contracting business?

A. Eighteen years.

Q. Have you followed contracting exclusively during that time?

A. Yes, sir.

Q. Are you acquainted with the prevailing prices of brick, material and work?

A. Yes, sir.

Q. You have made this calculation on the basis of prevailing prices in this locality, have you?

A. Yes, sir.

Q. Mr. Burkhart how do the prices on which you made this alteration compare with the average price for such work and material?

A. Based on prices paid in this locality now.

Q. How does that compare with the usual prices?

A. Well the usual prices; I figured the brick above the usual price because there were only three hundred and it costs more to get that number; the usual price of brick runs \$8.00 to \$9.00.

And further this deponent saith not.

Mileage, 104 Miles.....	\$10.40
Attendance, 2 days.....	3.00
Total	\$13.40

WARREN L. FISK, a witness of lawful age, being first duly sworn, deposes and says as follows:

Direct examination.

By CHARLES N. KIMBALL, Esq.:

Q. You may state your name, age, residence, and occupation?

A. Warren L. Fisk; age forty (40); residence 548 Brush Street, Detroit, Michigan; occupation, Secretary and Assistant Treasurer of the Detroit Steel Cooperage Company.

Counsel for the Sistersville Brewing Company objects to the re-examination of the witness, he having been heretofore examined in the City of Detroit, Michigan.

167 Q. You may state whether or not you are the same Warren L. Fisk whose deposition was taken in Detroit, Michigan, on January 31st, 1911, in this cause?

A. I am.

Q. You may state whether, or not, since your former deposition was taken you have been in the brewery of the Sistersville Brewing Company at Sistersville and in the chip casks or tank room of that brewery?

A. I have.

Q. When?

A. On February 15th.

Q. What year?

A. 1911.

Q. Were you present when the deposition- of Sidney W. Bollinger, Conrad Kail, Frank Regan and Louis Meyers were taken in the City of Pittsburg, on February 14th, 1911?

A. I was.

Q. Was it before or after that date that you were in the Sistersville Brewing Company's building?

A. Afterwards.

Q. State whether, or not, you made an examination of the interior of the chip casks room in the brewery of the Sistersville Brewing Company and of the chip casks or tanks, therein sold by the Detroit Steel Cooperage Company to the Sistersville Brewing Company?

A. I did.

Q. State whether, or not, you made an examination of the chip casks or tanks in that room with a view of ascertaining whether, or not, there were any attemporators in these chip casks, or tanks?

A. I did, yes, sir.

Q. Were there any attemporators in any of the chip casks, or tanks, in the chip casks or tank room?

A. There were not.

Q. State whether, or not, you made any examination of the interior side of the wall filling up the arched opening through which the chip casks, or tanks, were taken into that room with a view of ascertaining whether the inside surface of that arch was covered with any cork insulation, cement, plaster or other substance?

A. I did.

Q. Was the inside surface of the wall filling up that arched — covered by any substance?

A. It was not.

Q. Was there any cork insulation over it?

A. No, there was not.

Q. Was there any cement coating or surface over it?

A. No.

Q. Was there any plaster over it?

A. No.

Q. You may state the location and position of the refrigerating and cooling pipes in that chip casks room?

A. They were suspended from the ceiling over the gangway.

Q. You mean the ceiling of the room?

A. Ceiling of the room, yes, sir.

Q. You may state whether, or not, there were any refrigerating, cooling or water pipes over or across the end of the chip casks room, in which the arched opening is located?

A. There were none.

168 Q. Were there any pipes or plumbing across the inside of that arch?

A. There was not.

Q. Where is the bunging system located in that room?

A. Over the gang-way, suspended from the ceiling of the room.

Q. In what way, or manner, is the bunging system connected with the chip casks or tanks?

A. Most of them, no connection at all. On a few, probably three or four, there was a rubber hose connecting the bunging apparatus with the tanks.

Q. How was that rubber hose attached to the chip casks, or tanks?

A. Screwed on.

Q. Was that a temporary or permanent connection?

A. Temporary.

Q. These conditions that you have enumerated existed at the time you were in the chip casks room in the brewery in February, 1911?

A. Yes, sir.

Q. Were there any connections between the chip casks or tanks and the filter?

A. Yes, there was a rubber hose connection.

Q. And how was that rubber hose connected to the chip casks or tank?

A. It was screwed on to the racking cock of the tank.

Q. How could that rubber hose be disconnected or unfastened from the chip casks or tank?

A. By unscrewing the union joint or hose coupling it is called.

Q. Was that fastened with a temporary or permanent fastening?

A. Temporary.

Q. How was the rubber hose connected to or fastened to the filter?

A. In the same manner.

Q. And by the same connection?

A. Yes, sir; that is a similar one, not the same one.

Q. I believe you said there was a rubber hose that connected the two?

A. Yes, sir.

Q. Have you seen the manner in which a garden hose is usually connected to a hydrant?

A. Yes, sir.

Q. In what manner did the connection of the rubber hose to the chip casks or tank and to the filter differ from the connection of a garden hose to a hydrant?

A. It was the same.

Q. Had you ever been in the brewery of the Sistersville Brewing Company at Sistersville before this occasion, in February, 1911, that you have related?

A. No, I had not.

Q. Did you make any examination of how the chip casks or tanks were connected up to the brewery building?

A. I did.

Q. You may describe it?

A. They were not connected at all; the tanks simply set on the floor and held in place by their own weight.

169 Q. Were they connected in any way with plumbing except the rubber hose that you have enumerated?

A. No.

Q. What have you to say about the connection of the iron legs, on which the tanks rested, with the brewery building?

A. No connection; just simply rested on the floor.

Q. At this time, did you observe the condition of the chip casks or tanks?

A. I did.

Q. How did that differ at that time from the condition of the tanks at the time they were shipped for placing in the brewery?

A. Why, there was no difference; they were the same tanks we shipped from the factory.

Q. What was the condition of those tanks at the time you saw them in the brewery building in February, 1911,—good or bad?

A. Good.

Q. State whether, or not, in any calculation or estimate of the cost and expense of taking the bricks out of the arched opening and putting them back, any allowance should be made because of cork insulation some place on the interior surface of the arched opening?

A. There should not.

Q. Why?

A. Because there was none there at the time I made the examination.

Mr. JACOBS: The defendant still objects to the deposition and moves a suppression of the same.

No cross-examination.

And further this deponent saith not.

CARL H. BOGER, a witness of lawful age, being first duly sworn, deposes and says as follows:

Direct examination.

By CHARLES N. KIMBALL, Esq.:

Q. State your name, age, residence and occupation?

A. Carl H. Boger; 334 West Franklin street, Hagerstown, Maryland; salesman; age, fifty-one.

Q. How long have you been a salesman, Mr. Boger?

A. For the last ten months.

Q. What are you selling?

A. Brewery supplies.

Q. What were you engaged in previous to becoming a salesman?

A. I was brewmaster for twenty-two years.

Q. Were you ever connected with the brewery of the Sistersville Brewing Company in Sistersville, West Virginia?

A. Yes, sir.

Q. In what capacity?

A. I superintended the building of the brewery, oversaw it, and as brewmaster.

170 Q. When did you first commence, or assume, the duties of superintendent of the building of the brewery at Sistersville?

A. I believe it was in the middle of September, 1905.

Q. How long did you continue in that position?

A. Not quite four (4) years.

Q. Until what time?

A. Until March, 1909—I do not know exactly the date.

Q. Had you anything to do with the installing of the machinery inside of the brewery building?

A. Yes, sir.

Q. What did you have to do with it?

A. Well, I located and installed pretty near all of the machinery, pumps, generators and motors.

Q. Were the steel chip casks or tanks purchased from the Detroit Steel Cooperage Company installed in the brewery building, while you were in charge?

A. They were.

Q. Do you know when that was?

A. That was in August, 1908, I believe, if I am not mistaken.

Q. Did you superintend the installation and arrangement of the chip casks in the chip casks room?

A. I did.

Q. State briefly how they were installed and arranged in that room?

A. Well, they was rolled in through an opening; in the south end of the building through an opening left there for that purpose.

Q. And how were they set up—what arrangement?

A. They were set up in the floor; placed on iron supports.

Q. Well, in what shape or form, inside of that room?

A. They were set up vertical.

Q. In rows or—

A. In rows.

Q. How many rows?

A. Two rows.

Q. How many in each row?

A. One was seven and the other was six.

Q. What have you to say with reference to any passage way or aisle between?

A. There was a passage way in the centre.

Q. Extending through the centre of the room?

A. Yes, sir, from one end to the other.

Q. Now, you say they were taken in through sort of an opening?

A. Yes, sir.

Q. Now, what kind of an opening was that?

A. It was arched.

Q. For what reason or why was that arched opening left in the wall?

A. It was merely left so we could take them in together instead of taking them apart in sections.

Q. How long did the brewery stand with that arched opening left standing open in the wall?

A. About three years.

Q. After these chip casks, or tanks, were taken inside of the chip casks or tank room, how were they fastened or connected up
171 with the brewery building?

A. They were not connected to the building at all.

Q. How were they held in place?

A. Well, merely iron supports which rested on the floor; set on the floor.

Q. Were these supports screwed underneath or fastened in any manner in the floor?

A. No.

Q. What kind of material was the floor made of?

A. Cement floor.

Q. Were the legs imbedded in the cement?

A. No.

Q. You say you were in charge of the brewery up until March, 1909?

A. About that.

Q. Were these tanks used by you in operating the building while you were there?

A. Not all.

Q. How many were in use?

A. I believe about six was never used.

Q. Why weren't they used?

A. We didn't have any material to brew.

Q. You had no use for them then was the reason, was it not?

A. Yes, sir.

Q. The tanks were in good condition?

A. Oh, yes, sir.

Q. It was not because they were not properly set up you didn't use them?

A. No.

Q. Do you know whether, or not, the Brewing Company operated the brewery after you left in March, 1909? Was it in operation after you left in March, 1909?

A. I heard they put it in operation.

Q. How long after?

A. That is more than I can tell; I left the town then.

Q. What was the condition of these chip casks or tanks with reference to their condition when they were installed in the brewery?

A. About the same.

Q. Did you see attemporators in operating the Sistersville brewery?

A. I did.

Q. Where were the attemporators placed?

A. In the fermenting tubs.

Q. Where are the fermenting tubs?

A. On the third floor—stock house.

Q. And what floor is the chip cask room on?

A. On the main floor.

Q. You mean by the main floor the first floor, do you not?

A. The first floor.

Q. While you were in charge of the brewery were there any attemporators placed in or used in the chip casks or tanks?

A. No.

Q. In your experience as a brewer, in what tanks are the attemporators usually placed and used?

A. On the fermenting tubs.

172 Q. Through what other vessels, or tubs, is the beer run into the chip casks or tanks?

A. From the stock tubs.

Q. What do you use the stock tubs for?

A. To age the beer.

Q. Describe the manner or means by which the beer is run from the stock tubs into the chip casks or tanks?

A. To each vessel or stock tank there is a spring valve—spigots reach inside; they are connected with male and female hose couplings.

Q. And the beer is run through the hose?

A. Yes, sir.

Q. From the stock tanks to the chip casks?

A. Yes, sir.

Q. What material is that hose that was used for that purpose made of?

A. Rubber hose.

Q. Was the connection of the rubber hose onto the stock tub a permanent or temporary connection?

A. Temporary.

Q. What instrument did you use in connecting the hose to the stock tub?

A. A coupling.

Q. Was it necessary to use a wrench or did you use your hands, or how?

A. Just the hand.

Q. What instrument or means did you use to connect the rubber hose to the chip casks or tanks?

A. The same—by hand.

Q. It was not necessary to use a wrench?

A. No.

Q. To what place was the beer run from the chip casks or tanks while you were in charge?

A. To the racker.

Q. Describe the manner or means used by you while in charge of the brewery in running the beer from the chip casks or tanks to the racker?

A. There was a rubber hose attached to the chip casks with female couplings from the chip casks to the racker.

Q. What kind of coupling was attached to the racker?

A. Same coupling.

Q. And the beer was run through that rubber hose from the chip casks to the racker?

A. Yes, sir.

Q. Now, what instrument did you use in attaching the rubber hose to the chip casks?

A. Hand.

Q. No instrument necessary?

A. No.

Q. What instrument did you use in connecting the rubber hose to the racker?

A. The same.

Q. Your hand?

A. Yes, sir.

Q. Were these connections at the chip tanks and the racker temporary or permanent connection?

A. Temporary.

Q. State whether, or not, while you were in charge of the brewery the chip casks were always connected up by the rubber hose to the racker?

A. Only when in use.

Q. What do you mean by when in use?

A. At the time — racking off.

173 Q. What do you mean by racking off?

A. Flowing the beer from the chip tanks.

Q. When were the chip casks connected with the fermenting tubs, or stock tubs?

A. When they were refilled.

Q. Were they connected at any other time?

A. No.

Q. What was done with the rubber hose which was used to run the beer from the stock tub to the chip casks, or tanks, when not in use?

A. The hose was washed out and stretched out in the cellar.

Q. On the floor?

A. Yes, sir.

Q. What was done with the rubber hose used to run the beer from the chip cask or tank to the racker, when not in use?

A. The same thing.

Q. Washed out and laid on the floor?

A. Yes, sir, out straight.

Q. On what floor?

A. The floor running from the chip cellar to the racking room.

Q. Where were the refrigerating or cooling pipes located in the chip cask room while you were in charge?

A. In the ceiling.

Q. State whether, or not, there were any pipes or plumbing across the inside of the walled up arch?

A. There wasn't any.

Q. Were there any pipes or plumbing on the inside wall of the arched opening?

A. No.

Q. Or connected with it?

A. No.

Q. Were you present when the arched opening was walled up by Mr. Burkhart?

A. I was.

Q. State whether, or not, any insulation was placed over the inside of the wall filled, and arched opening, while you were in charge of the brewery?

A. There was no insulation whatever.

Q. Was there any covering of any kind of the inside wall of that arched opening while you were in charge of the brewery?

A. No.

Q. Was there any cement, plaster, cork or other substance placed on the inside wall of that arched opening, while you were in charge of the brewery?

A. No.

Q. What would be necessary for the purpose of taking out or removing the chip casks or tanks from the chip cask room of the Sistersville Brewery Company?

A. The taking out of the bricks that that arch is closed up with would *that* be all that would be necessary.

Q. Would that be all that would be necessary?

A. Yes, sir.

Q. In your experience as brewmaster have you ever known of that being done in similar instances?

A. Oh, yes, sir.

174 Q. What is the purpose or reason of leaving the arch opening in the wall?

A. That is left there for the purpose of taking the casks in and out; otherwise they would have to be taken apart and take them through a door or window and put them together in the room.

Q. Will you state where the bunging system was arranged in the chip cask room of the Sistersville Brewery, while you were in charge?

A. In the centre of the ceiling.

Q. At what point in the room?

A. From one end to the other, in the centre—the full length of the room.

Q. Near the ceiling or near the floor?

A. Near the ceiling.

Q. State whether the bunging system was ever connected with the chip casks, or tanks?

A. At times.

Q. When?

A. When they was refilling.

Q. That is, you mean by that, when running full after being emptied from the stock tubs?

A. Yes, sir.

Q. What was the means or matter of connection between the bunging apparatus and the chip casks or tanks?

A. Connected with a rubber hose and coupling.

Q. And how was that rubber hose connected with the bunging apparatus?

A. With a coupling.

Q. What kind of a coupling?

A. A female coupling.

Q. What instrument was necessary to fasten or couple that rubber hose onto the bunging apparatus?

A. Just screwed on with the hand.

Q. Was that fastening temporary or permanent?

A. Temporary.

Q. And how was that rubber hose connected with the bunging apparatus attached to the chip casks or tanks?

A. By a coupling.

Q. With the same kind of a coupling?

A. Yes, sir.

Q. No instrument necessary to attach it?

A. No.

Q. What was done with the rubber hose when not in use and connected between the bunging apparatus and the chip casks or tanks?

A. It was just disconnected.

Q. Where is the racking room in the Sistersville Brewery?

A. Right on the side next to the chip cellar; connected with the chip cellar.

Q. In a separate room from the chip casks?

A. Entirely separate room.

Q. Then the racking off from the barrels, or casks, was done in a separate room from the room in which the chip casks or tanks are located?

A. Yes, sir.

Q. In tearing out the bricks in the arched opening and removing the chip casks or tanks from the chip cask room, would it be necessary to tear out or interfere with any pipes or plumbing in the Sistersville Brewery?

A. No, sir.

175 Cross-examination.

By T. P. JACOBS, Esq.:

Q. Mr. Boger, what is an attemporator?

A. Merely a coil of iron or copper through which brine circulates to cool the beer after it reaches its highest stage of fermentation.

Q. Now, in the Sistersville Brewing Company's brewery where were they used?

A. In the fermenting tub.

Q. In what story?

A. In the third story.

Q. How many attemporators were there?

A. There was ten.

Q. And you used them after the beer has been thoroughly fermented?

A. They let it go so high and then turn the attemporators on to cool it down.

Q. Then where does the beer go to?

A. Down to the stock tubs.

Q. What story?

A. Second story of the stock house.

Q. What do they do with it in the stock tubs?

A. They cool it after fermentation.

Q. The fermentation is all done then?

A. Yes, sir.

Q. How do they get it from the third story to the stock tubs?

A. Attach a rubber hose to the stock tubs.

Q. And you only use this rubber hose when necessary to bring it down to the stock tubs?

A. Yes, sir.

Q. How many stock tubs in the Sistersville brewery?

A. Ten.

Q. How many hose connections?

A. Well, you can say—all alike, and they would be used in every tank there through the building.

Q. From the tanks in the third story to the stock tub in the second?

A. Yes, sir.

Q. And did you have more than one of them?

A. Oh, yes, sir, about fifty.

Q. I mean to bring it down from the third story to the stock tanks how many rubber hoses did you have?

A. Rubber hose fifty feet long and to reach to the end of the building would probably have to have, say, another fifty feet of it.

Q. Those hoses are absolutely necessary, are they not?

A. Yes, sir.

Q. You couldn't bring down the beer to the stock tubs without this hose, could you?

A. No.

Q. Or something to take the place of them?

A. No, sir.

Q. Now, through what process did the beer go, if any, when in the stock tank?

A. We call that further fermentation; there is no process—the beer is stored there for a certain length of time.

Q. What length of time?

A. It varies from six weeks to three months; beer used for
176 draught beer is generally stored six weeks and bottled beer three months, and then transferred from the stock tub to the chip casks.

Q. How do you transfer it from the stock tubs to the chip casks?

A. Through a rubber hose.

Q. The same way you get it from the third floor to the second?

A. Yes, sir.

Q. The rubber hose that you transfer it to the chip cask is the same kind of rubber hose is it?

A. Same size, yes, sir.

Q. It is absolutely necessary, is it?

A. Yes, sir.

Q. And it is necessary to attach that hose to the chip casks and to the tubs in the second story?

A. Yes, sir.

Q. And that is done by screwing it on?

A. Screwing on to the hose coupling.

Q. That you say can be done with the hand?

A. Yes, sir.

Q. And you do not need any wrench or anything?

A. No.

Q. Made by the use of the hand and not by any instrument?

A. No.

Q. It is absolutely necessary to have attachment when bringing the beer down to the chip casks?

A. Yes, sir, that is the only way.

Q. That is the only way?

A. Yes, sir.

Q. When you are through transferring the beer down to the chip casks, why do you detach this hose and wash it out?

A. To keep it clean and get it out of the way.

Q. And that can be used a second, or a third or a dozen times?

A. Yes, sir, can be used until it is worn out.

Q. Now what is the purpose of putting the beer in the chip casks—how long do you allow the beer to remain in the chip casks until ready to put on the market?

A. About from two weeks to a month.

Q. And all of the beer that comes from the brewery plant goes through the chip casks?

A. Yes, sir.

Q. The chip casks are a necessary part of the plant?

A. Yes, sir.

Q. Is that right?

A. Yes, sir, that is the last process the beer has to go through.

Q. The beer necessarily comes from the chip casks before it goes to market?

A. Yes, sir.

Q. Now, how do you get it from the chip casks to the racker?

A. By attaching a rubber hose to the chip casks.

Q. And then it goes into barrels?

A. Yes, sir.

Q. One-half barrels and one quarter barrels?

A. Yes, sir.

Q. And bottled?

A. It is bottled from the barrels in the bottling department.

177 Q. Well, the bottling is not a necessary part of making the beer?

A. That is independent from the brewing altogether.

Q. Well, you draw it from the chip casks to the racker?

A. Yes, sir.

Q. Where is it located?

A. In the racking room.

Q. In this case next to the chip cellar?

A. Yes, sir.

Q. The chip cellar is on the ground floor?

A. Yes, sir.

Q. And that is concreted is it not in this brewery?

A. Concrete and cement finish.

Q. And all that system of hose from the top story down to the

chip cask room, and from that room to the racker are all necessary instruments, are they not?

A. Yes, sir.

Q. And your reason for unscrewing them and detaching them and washing them and putting them aside is to keep them clean and out of the way?

A. Keep them out of the way.

Q. Now, you say during the time you were brewmaster at the Sistersville Brewing plant there were only seven of the chip casks used by you?

A. That is all I had in use; I know I didn't have them all full.

Q. Well, your reason for not using the others, you ran out of material did you not?

A. Yes, sir.

Q. The plant is susceptible of filling all of the thirteen, is it not?

A. Well, that depends.

Q. If you have the material?

A. Yes, sir, and a market for it.

Q. So that the Sistersville Brewing Company can be run either at its full capacity, or partial capacity, can it not?

A. Oh, well it can be run.

Q. What do you call a stock room?

A. Well, a stock room is the second floor of the stock house.

Q. What do you use that for?

A. For storage of the beer.

Q. Before it goes to the chip casks?

A. Yes, sir.

Q. Now, you spoke of this hose only being used for temporary purposes—now the key to the out door is only used for temporary purposes, is it not?

A. Yes, sir.

Q. And still it is necessary to use it, is it not?

A. Yes, sir.

Q. Now, chip casks of some kind, either the kind of the Sistersville Brewing Company or some other kind, are absolutely necessary to the completion of a brewery are they not?

A. Well, not exactly.

Q. I am speaking of the Sistersville Brewery?

A. Well, they are necessary there.

Q. You cannot make beer in the Sistersville brewery without chip casks?

A. No; couldn't finish it.

Q. And you couldn't transport it some place else and finish it, could you?

A. No, not very easily.

Q. If these chip casks were taken out, then that plant
178 up there wouldn't be completed brewery plant, would it?

A. No.

Q. Would it be necessary in order to make beer to have some kind

of casks up there in the plant—I say in this case is it necessary to have chip casks?

A. Chip casks or steel tanks.

Q. As I understood you, you stated that the capacity of the Sistersville Brewery plant was such that you could use, if necessary, all of the chip casks?

A. Could keep them all in use.

Q. Provided you had a market for the property?

A. That is what I say.

Q. If the circumstances justify it?

A. Yes, sir.

Q. Do you know whether, or not, it is a fact that all of the chip casks were used after you left there?

A. I do not know.

Q. You have no information on that?

A. No.

Q. About when did you quit?

A. That was about two years ago in March.

Q. Two years ago this present March?

A. Yes, sir.

Q. That would be 1909?

A. Yes, sir, 1909.

Q. And you have not been back here since?

A. No.

Q. The arch that you speak of is simply a matter of convenience, is it not?

A. Yes, sir.

Q. And the chip casks can be taken in otherwise, could they not?

A. No, not unless taken apart.

Q. That is what I mean, take them apart and put them in?

A. Yes, sir.

Q. Well, now, the arch way is the same thickness of the wall, is it not?

A. Yes, sir.

Q. What is the duty of a brewmaster?

A. Well, to direct the work—how it should be performed and oversee it.

Q. In other words, the brewmaster is superintendent of the plant?

A. Yes, sir; inside.

Q. Do you know whether there is beer in these chip casks at the present time?

A. I do not know whether there is, or not.

Q. Have you been in the brewery since you have been here?

A. No.

Redirect examination.

By CHARLES N. KIMBALL, Esq.:

Q. Mr. Boger, what was the size of the rubber hose that was used to flow the beer from the fermenting tubs to the stock tubs and from

the stock tubs to the chip casks or tanks and from the chip casks or tanks to the racker?

A. An inch and a half.

Q. All inch and a half hose?

A. Yes, sir.

179 Q. Were the connections on the fermenting tubs, the stock tubs and the chip casks or tanks, and the racker, all the same size?

A. All the same size.

Q. Could the same hose be used interchangeable between any of these tubs?

A. Yes, sir.

Q. What were the attemporators connected to that you had in the fermenting tub?

A. One was connected to the brine line.

Q. What was the brine line connected to?

A. Connected in the freezing plant of the ice plant.

Q. Was any part of that in the chip cask room?

A. No.

Q. The stock tanks are to age the beer, are they not, after fermented?

A. After it is fermented, yes, sir.

Q. Isn't it a fact some brewers don't use chips in the manufacture of beer at all?

A. Yes, sir.

Q. If the chip casks or tanks placed in the Sistersville brewery by the Detroit Steel Cooperage Company were taken out, other chip casks or tanks could be put back in their place could they not?

A. Yes, sir.

Q. If these chip casks or tanks were taken out a carbonating system could be put in that brewery and do away with the chip casks or tanks altogether?

A. Yes, sir.

Q. Then the chip casks or tanks of the exact pattern style and make that were placed in the chip cask room by the Detroit Steel Cooperage Company are not absolutely essential or necessary to the making of beer in that brewery—other tanks could be placed in there?

A. Yes, sir.

Q. Or a carbonating system could be put in?

A. Yes, sir.

Q. Do you know whether, or not, there are other brands or makes of chip casks or tanks on the market than those made by the Detroit Steel Cooperage Company?

A. A dozen firms make wooden chip tanks; Pfander & Company make them and the Vacuum Fermentation Company.

Q. Mr. Boger, how long have enamelled steel chip tanks or casks been used?

A. As far as I know, since 1886 the first tank I worked with.

Q. What kind of chip casks or tanks were used before they made the steel enamelled tanks?

A. Oak chip casks.

Q. Are oak chip tanks or casks used in any other breweries at this time?

A. Yes, sir, mostly.

Q. There are some breweries that won't use steel tanks at all, aren't they?

A. They generally keep the oak chip tanks until they are worn out and then replace them with steel chip casks and tanks.

Q. If there was any beer at the present time in the chip casks or tanks in the Sistersville Brewery, that could be run off 180 into one-half barrels and kegs, could it not?

A. Oh, yes, sir.

Q. And the beer preserved to the manufacturer in that way?

A. If it is finished ready for the market; otherwise it could be pumped back into the stock tub room.

Q. And put in a stock tub?

A. Yes, sir.

Q. Would that injure the beer any?

A. No, provided they could keep it attemperated.

Q. Then the beer could be saved by racking it off into barrels or pumping it into the stock tub?

A. Yes, sir.

Q. And that would not damage the beer any?

A. No.

Q. Could it be kept at the same temperature in the Sistersville Brewery?

A. Yes, sir.

Q. It could?

A. Yes, sir.

Q. Were you present when Mr. Burkart walled up the arched opening through which the tanks were taken?

A. Yes, sir.

Q. Were the bricks with which he filled up that arched opening interlocked with the bricks in the side wall of the brewery building, either on the front or in the rear?

A. No.

Recross-examination.

By T. P. JACOBS, Esq.:

Q. Mr. Boger, is there any appliance for pumping beer back from the chip casks up at the Sistersville Brewery?

A. Yes, sir.

Q. Did you ever use it?

A. No, I had no cause for that; we let it run down from above.

Q. You didn't have any need to use it?

A. No.

Q. Now, speaking of removing the chip casks from the Sistersville Brewery you could remove the engine, couldn't you and put a new engine in?

A. That could be done too.

Q. And you could remove the stock tubs and put new stock tubs in, couldn't you?

A. The stock tubs couldn't be moved.

Q. Couldn't they be taken down and moved out?

A. Not very easy.

Q. Well, it could be done, couldn't it?

A. Oh, it could be done.

Q. You could take the boiler out and remove the boiler couldn't you and put in another boiler?

A. That could be moved too if disconnected.

Q. When it comes to the question of moving you could take everything out of that building and make a flour mill out of it, couldn't you?

A. Oh, yes, sir.

Q. And when it comes to taking down walls, you could
181 take down a hole in the wall any place, couldn't you?

A. If there is any opening left for that purpose.

Q. That arch way was simply left as a matter of convenience, wasn't it?

A. Yes, sir.

Q. And so it is within the range of possibility to convert that building into any kind of a mill—a planing mill?

A. Yes, sir.

Q. Or even a livery stable or boarding house?

A. You would need some beer there for a boarding house though.

Redirect examination.

By CHARLES N. KIMBALL, Esq.:

Q. Would it be necessary to take the stock tanks apart in taking them out of the brewery?

A. Oh, yes, sir, the only way they could be taken out.

Q. Was any opening left in the brewery wall when completed for taking the stock tubs in or out?

A. No.

Q. Was any opening left in the wall for taking in the engine or taking it out when completed?

A. No.

Q. Was there any arched opening besides the windows left in any other part of the brewery building for taking in or taking out any appliances in the brewery building except in the chip cask room?

A. No.

Q. Were the stock tubs put together and set up when put in the brewery building or did they come all put together and put up entire?

A. They were set up in the stock tub room; they came apart.

Recross-examination.

By T. P. JACOBS, Esq.:

Q. The stock tanks were put up in the stock room?

A. Yes, sir.

Q. So they could be taken down?

A. Yes, sir.

Q. And they could be taken out the same opening they were put in through?

A. Yes, sir.

Q. And there was an arch way in the engine house where the engine was put in, wasn't there?

A. There was merely a door.

Q. Well, it was a large door?

A. Yes, sir.

Q. Arched over, isn't it?

A. An iron lintel, I believe.

Q. Isn't it arched with brick—isn't that a circular frame?

A. It has an iron lintel over the door I am sure about that.

Q. Wasn't one of the engines taken out and sent back after it was installed?

A. Not that I know of; there was only one put up.

182 Q. You say it was not taken out and sent back?

A. A part of it laid on the platform.

Q. What was it that was placed in the engine room after the building was completed?

A. Once ice machine and two generators.

Q. That was a piece of machinery that weighed forty-two hundred pounds, wasn't it?

A. Oh, it weighed more than that.

Q. What was it, forty-two thousand pounds?

A. I can not tell exactly.

Q. Well, it was an immense piece of machinery, wasn't it?

A. Yes, sir.

Q. Without stock tubs, you couldn't run the Sistersville brewery, could you?

A. Yes, sir, you could run it without stock tubs.

Q. Without stock tubs?

A. Yes, sir.

Q. You could run it without stock tubs?

A. Yes, sir.

Q. What would you use in place of them?

A. Leave the beer longer in fermentation and then carbonate it.

Q. And then you would have a carbonating process up there—that would be a different system, altogether from the one used?

A. Certainly.

Q. But I say this brewery—you couldn't run the Sistersville Brewery without stock tanks?

A. No.

Q. Any more than you could run it without chip tanks?

A. No.

Q. Will you tell us, Mr. Boger, what is meant by chip tanks?

A. They keep the beer under pressure, and clarify it, by a bunging apparatus to keep the beer under uniform pressure of about five pounds—

Q. You don't understand the question—why do they call these tanks chip tanks?

A. Because they use chips in them.

Q. Of what material are they?

A. Beech-wood—made to clarify it.

Q. What about the bunging apparatus—that is used in drawing the beer from the chip tanks, is it?

A. No.

Q. Where do you use the bunging apparatus?

A. The bunging apparatus is a line, a half inch line in the centre of the chip cask room with hose attachment, and shows how much pressure you have got in each and every tank.

Q. The bunging apparatus has no connection with the drawing off of the beer and putting it in buckets?

A. No, none whatever; simply to keep the beer under uniform pressure.

Q. So you can keep it under your eye?

A. Yes, sir, have control over it.

Q. To keep control over the condition of the beer, in the chip casks?

A. Yes, sir.

183 Q. If you took off that bunging apparatus, what would likely occur—might you have some of a higher degree of pressure and some lower?

A. If the pressure gets too high or too low you could open the cocks and reduce the pressure or raise it.

Redirect examination.

By CHARLES N. KIMBAL, Esq.:

Q. Then, the bunging apparatus in the Sistersville Brewing Company's brewery is a half inch line extending across the ceiling of the chip cask room, connected with the chip casks, when there is beer in them, by a rubber hose and filled with air pressure?

A. Yes, sir; the pressure from the tank goes into the line.

Q. There is no beer that runs through the bunging system?

A. Oh, no.

Q. What was used to close up this door through which the refrigerating machinery or engine was taken that you have related—was that door walled up or closed by a wooden door?

A. By a wooden door; double door.

Q. What was the width or size of that door which you say?

A. About seven feet—in that neighborhood.

Q. How high?

A. About nine feet.

Q. An arched opening over the top?

A. No, it is not arched; might be arched over the lintel.

Q. And it was closed by an ordinary wooden door?

A. Yes, sir.

Q. What part of the brewery is that door in; which one of the buildings?

A. It is towards the railroad, in the boiler house and engine room.

Q. Is it in the boiler house and engine room?

A. Yes, sir.

Q. Now, what part of the brewery building is the chip cask or tank room in?

A. In the main story of the stock house.

Q. Over in the stock house?

A. Yes, sir.

Q. Mr. Boger, what would be necessary to change the system in the Sistersville Brewery from the present system to a carbonating system?

Counsel for George W. Hartman, the Sistersville Brewing Company, et al. objects to the question as being irrelevant, immaterial, incompetent and otherwise improper because the question involved in this case is not the propriety of the brewing company changing from one system to another in the manufacture of beer but involves another and different legal question, so that any answer that may be given to the question asked is objected to there being no question as to what might be done, or could be done, but what has been done, and moves to strike out the question and any possible answer that may be given to it.

A. Get a carbonator and the necessary apparatus for it.

Q. What machinery or appliances in the present brewery would be eliminated by using the carbonating system?

A. None whatever.

Q. How about the stock tubs, could they use these with the carbonating system?

A. They could.

Q. Would they?

A. They could be used for pressure tanks.

Q. Then, if I understand you correctly, the only appliances that would be eliminated by the installation of the carbonating system would be the chip casks or tanks, is that correct?

Recross-examination.

By T. P. JACOBS, Esq.:

Q. You could turn a straw hat into a bird's nest, couldn't you?

A. Certainly.

Q. Or you could turn the Sistersville Brewing Company by the necessary expenditure of money and appliances from a brewery plant into a distillery?

A. Yes, sir.

And further this deponent saith not.

Attendants, 2 days	\$3.00
Mileage, 115 (one way)	11.50
Total	14.50

The plaintiff offers in evidence the transcript of the record of the case of George W. Hartman, et al. vs. The Sistersville Brewing Company et al., in the Circuit Court of the United States for the Northern District of West Virginia, the same to be marked Plaintiff's Exhibit "Record". Also a certified copy of Deed of Trust, dated December the 1st, 1906, from Sistersville Brewing Company to John S. Sell, Trustee, the same to be marked Plaintiff's Exhibit "AA," recorded in the office of the Clerk of the County Court of Tyler County, West Virginia, in Deed and Trust Book 13, page 7. Also a certified copy of Deed of Trust dated August 1st, 1907, from Sistersville Brewing Company to Abijah Hays, Trustee, recorded in the office of the Clerk of the County Court of Tyler County, West Virginia, in Deed and Trust Book 13, page 185 135, the same to be marked as Plaintiff's Exhibit "AB".

Also a certified copy of Deed of Trust dated September 24th, 1908, from Sistersville Brewing Company to Charles Claus, Trustee, recorded in the office of the Clerk of the County Court of Tyler County, West Virginia, in Deed and Trust Book 13, page 361, the same to be marked as Plaintiff's Exhibit "AC." Also a certified copy of Judgment Lien Docket of Tyler County, West Virginia, setting forth abstract of judgment entered December the 23rd, 1907, in favor of J. Hanford McCoy vs. Sistersville Brewing Company for \$262.50 with interest and costs, recorded in Judgment Lien Docket No. 2, page 111, the same to be marked as Plaintiff's Exhibit "AD." Also a certified copy of Judgment Lien Docket of Tyler County, West Virginia, setting forth abstract of judgment, under February term, 1909, of the Circuit Court of said county, in favor of Henry Fenchtwanger et al. vs. Sistersville Brewing Company, for \$3,490.72, with interest and costs recorded in Judgment Lien Docket No. 2, page 131, the same to be marked as Plaintiff's Exhibit "AE."

Taxation of Costs:

To Albert Burkart, Attendance and mileage, Paid by Att'y for Pl'tf.....	\$13.40
To Carl H. Boger, Attendance and mileage, Paid by Att'y for Pl'tf.....	14.30
To F. H. Mayne, taking and transcribing depositions, Paid by Att'y for Pl'tf.....	24.50
To Geo. F. Durham, notary public.....	3.00
To Geo. F. Durham, expressage.....	.35

[SEAL.]

GEO. F. DURHAM,
Notary Public.

STATE OF WEST VIRGINIA,
County of Tyler, ss:

I, George F. Durham, Notary Public in and for the said County and State, do hereby certify that the above named C. R. Kerr, A. Burkart, Warren L. Fisk, and Carl H. Boger were by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that their depositions were taken down stenographically by F. H. Mayne, in the presence of said witnesses respectively and in the presence of counsel for the plaintiff and counsel for the defendant and that the said stenographic notes were then transcribed by said F. H. Mayne into typewriting; that the signatures of the witnesses to said depositions were waived by counsel, and that
186 the said depositions were taken pursuant to the attached stipulation and agreement of counsel for the respective parties in said cause, at the offices of Kimball & Sugden, on the 29th day of March, A. D., 1911, between the hours of 10:30 A. M. and 5.00 P. M.; that the parties were represented at the taking of said depositions, by their respective counsel, as set forth; that the several exhibits respectively were offered in evidence and marked as specified in the foregoing depositions and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In witness whereof, I have hereunto set my hand and official seal this 1st day of May, 1911.

[SEAL.]

GEO. F. DURHAM,
Notary Public, Tyler County, W. Va.

My commission expires Dec. 19th, 1919.

"Ex. Record" With Plaintiff's Depositions.

In Equity. No. 153.

GEORGE W. HARTMAN

vs.

SISTERSVILLE BREWING Co. et al.

Copies of the Files in said Cause.

Bill of Complaint.

Filed April 9, 1909, at Wheeling.

To the Honorable the Circuit Court of the United States for the Northern District of West Virginia:

The bill of complaint of George W. Hartman, a citizen of Pennsylvania, Bollinger Bros., a corporation and citizen of Pennsylvania, exhibited in said court against the Sistersville Brewing Company, a corporation of W. Va., Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, D. J. O'Neil, Clem Polen, citizens

of West Virginia, H. B. Shriver, ex-sheriff of Tyler County, W. Va., and the City of Sistersville, a corporation of W. Va., and W. E. Cummins, collector and treasurer of Sistersville, W. Va., defendants. Humbly complaining therefore unto your Honor your orators George W. Hartman and Bollinger Bros., a corporation, that heretofore, to-wit: on the — day of December, 1906, the Sistersville Brewing Co., a corporation, organized and doing business under the laws of the State of W. Va., in the City of Sistersville, 187 made and executed and delivered unto John S. Sell, a trustee, a certain mortgage or deed of trust, $\frac{1}{4}$ copy of which said mortgage duly certified is exhibited herewith as Exhibit "A" of this bill of complaint and prayed to be taken and held as a part of the same, which said mortgage was on the — day of —, duly admitted to record in the clerk's office of the County Court of Tyler County by which it will appear that the said Sistersville Brewing Co., a corporation, being thereto duly authorized by its constituted authorities made, executed and delivered unto said John S. Sell, trustee, the aforesaid mortgage whereby in consideration of the premises recited therein and in consideration of the sum of one dollar said Brewing Co. granted, sold, conveyed and set over unto said trustee, his successor or assigns a certain tract or parcel of land lying, being and situate in the City of Sistersville, W. Va., as will more fully appear by reference to said mortgage or trust, together with the Brewery building, machinery, and appliances thereon at that time erected or to be thereafter erected; that all the appurtenances thereto belonging or in anywise appertaining thereto, together with all the corporate rights and privileges of said brewing company.

Your orators further represent that the said Sistersville Brewing Co. at and previous to the date of execution of said trust had authorized the issue of a series of bonds aggregating eighty in the total for the sum of \$500.00 each and of the denomination of \$500.00 each, numbered consecutively from one to eighty, inclusive, said bonds bearing date the first day of December, 1906, bearing interest at the rate of six per cent. per annum and payable semi-annually on the first day of December and the first day of June, each year, principal and interest to be paid in gold coin of the United States of the present standard of weight and fineness, said interest to be paid as aforesaid with coupons attached to each bond therefor.

Your orators further represent that of the aforesaid recited bonds ten thereof will mature and become payable on the first day of December, 1909, which said bonds are owned and held by the complainant, G. W. Hartman, and the remainder of said issue of \$35,000.00 will mature annually thereafter in the same ratio as will appear in Exhibit "A" hereinbefore referred to. Your orators further represent that the aforesaid mortgage or trust was given for the purpose of securing the said issue of \$40,000.00 worth of bonds hereinbefore recited, there being eighty of said bonds of the denomination of \$500.00 each, and the same are now owned and held as follows: Bollinger Brothers are the owners and holders of nineteen of the said bonds, G. W. Hartman owns thirty bonds, Albert H. Oyer

six bonds, H. S. Bossart fifteen bonds, E. Arch Cohen eight bonds, and one bond is owned by some person unknown to your
188 orators. Your orators further represent that default has been made in the payment of the interest upon all of the said bonds hereinbefore referred to and secured by said mortgage, and that there was due to the complainants, Bollinger Brothers, on their said nineteen bonds the sum of \$4,035.00 interest as of December 1, 1908, and that there was due to your orator G. W. Hartman on his said thirty bonds the sum of \$450.00 interest as of December 1, 1908. Your orators do not state at this present time the amount of interest due to each of the holders of the other bonds respectively held by them. Your orators further represent that it was provided by said mortgage and deed of trust that said trustee was to have and to hold said property thereby conveyed to it for the use, benefit and security of the owners and holders of the aforesaid bonds provided for in said mortgage and to secure the payment of the same together with all accrued interest thereon subject to the free and uncontrolled possession and management of said premises therein conveyed until the said trustee should be authorized to enter upon the said premises to sell same as in the said trust specified, and for purpose of showing distinctly the terms and conditions and the definition of the obligations imposed upon said trustee it was further provided and declared in the said deed of trust as follows:

First. That the party of the first part, that is to say: Sistersville Brewing Company, corporation, should pay to the holders of the bonds provided for in said trust and intended to be secured by the same or any that might be issued in lieu thereof or in substitution of the same, respectively, the interest thereof semi-annually as the same may become due and payable according to the terms of the bonds described in said deed and on the dates therein mentioned for the payment of the same as will also, upon the dates and times mentioned in said bonds respectively whereon the principal sum of said bonds shall according to the provisions thereof respectively become due and payable fully and entirely pay off and satisfy as aforesaid the whole of said bonds both principal and interest without further delay and it is further provided that said Sistersville Brewing Company should pay any and all lawful taxes, charges, assessments, that should be laid, levied or assessed upon the said Brewing Company real estate and premises thereby mortgaged or upon the said corporation its property and franchises so as to save the estate thereby granted from perils of sale and forfeiture for non-payment of taxes, charges, or assessments and shall also further provide that said company should pay for such fire insurance policies for insurance on said brewery and other property covered by said mortgage on behalf of said trustee or its successors might from time to time demand not exceeding \$40,000 except by consent of first party
189 and in case of destruction or damage by any peril covered by said insurance, the amount of said policy or policies when paid, if sufficient with other funds of said party of the first part to repair or rebuild the said brewery or other property so destroyed should be appropriated for that purpose; and if not sufficient therefor then the

same should be used for the benefit or payment of the said bonds secured by said mortgage; and it was further provided that the Brewing Company will pay annually the taxes levied on said bonds by the State of West Virginia or any other authority until said bonds are paid or discharged.

Second. It was further provided that if said brewing company should after the date of said bonds at any time after demand made, default or refuse, neglect, or omit for any time exceeding three months to pay the semi-annual interest of said bonds secured by said mortgage or any part of them or should after demand make default, refuse, neglect or omit for any period exceeding three months to pay the principal sum of each and all of said bonds or any of them when — as the same become due and payable or shall neglect, refuse or omit to pay any lawful taxes, charges or assessments that may be laid, levied or assessed upon said brewery, real estate and premises, mortgaged as aforesaid, or upon said corporation its property or franchises, so that the estate thereby granted shall be in peril of sale or forfeiture for non-payment thereof or should neglect or refuse to pay for such insurance as the second party, to-wit, the said trustee, might in accordance with the terms thereof require, or should neglect or refuse to pay any taxes levied by any authority upon said bonds then and in every such case said second party, to-wit, the trustee, should upon the written request of the holder or holders of the majority of said bonds then outstanding enter upon and take possession of said brewery, real estate, premises and property mortgaged, and should manage, use and control said brewery to the best advantage, receive and take all stocks, amounts due and incomes thereof, and appropriate the net incomes and proceeds after deducting all payments of taxes, liens or charges as well and the expense of said trust and such sum or sums as *as* should be sufficient or proper to indemnify the trustee against any liability or loss or damage for or on account of any matter or thing done by said trustee in good faith, in performance of its duties as trustee to the payment in full, without any preference, priority, or distinction to one bond over any other, first, to the interest due upon and (second) to the principal of all the said bonds then outstanding in full. If the said income be sufficient but if not then pro rata; and it is further provided that said trustee shall and will either

190 after or upon entering after taking possession at the request of the holders of the majority of said bonds then outstanding proceed to sell brewery, real estate, premises and property mortgaged under said trust to the highest bidder at public auction in the city of Sistersville, after giving three months' notice of such intended sale by publication to be made once a week in at least one daily newspaper published in the City of Pittsburg, and one in the City of Sistersville and by not less than twenty hand bills posted in conspicuous places in the City of Sistersville.

Third. It was further provided that in the event of the resignation, neglect or refusal or incapacity to act as said trustee that said brewery company should have full power and authority to nominate and appoint a new trustee for the purpose of filling the vacancy caused

by said neglect or failure and the said trustee or trustees so nominated and appointed, should take upon himself the same trusts and powers and be subject to the other stipulations and conditions as are declared in said trust and to perform all the duties required of the said trustee.

Your orators represent that there are numerous other stipulations and provisions in the said mortgage contained which are not necessary to be recited here at length but to which your orators refer your Honor for the information to a certified copy of said mortgage which are made a part of this bill of complaint should the same be deemed necessary by the court.

Your orators further represent that the said Sistersville Brewing Company, a corporation, the grantor in said mortgage or deed of trust has made default therein in the following particulars: First: the said corporation has not paid any interest upon its bond issue hereinbefore recited to any of the holders of said bonds; Second: That the said corporation is now in default of the interest due on said bond issue; Third: That said corporation is in default to your orator Bollinger Bros, as on the first day of December, 1908, in the sum of \$4,035 interest accrued; and the said corporation is in default to your orator George Hartman in the sum of \$450 accrued interest on the said thirty bonds owned and held by him.

Fourth. That said corporation is in default in its failure to pay the taxes, charges and assessments levied against its said property by the City of Sistersville, Lincoln District, Tyler County, and State of West Virginia, in the aggregate of the sum of about fifteen hundred dollars.

Fifth. That said corporation has made default in said mortgage by failing to secure the necessary insurance required of it according to the terms, covenants and stipulations of the aforesaid mortgage and your orators further represent that said default or interest has accrued and continued for more than three months after the date of the accrued interest became due and no part of the interest on said mortgage bonds nor the taxes, levies and assessments hereinbefore recited have been paid by the said corporation or any one for it; nor has the insurance provided for in said mortgage ever at any time been secured by the said corporation or any one for it. And your orators further state that said corporation has wholly defaulted to keep the various material, covenants and agreements which it bound and obligated itself to keep and perform, and that its condition is such that your orators believe that it is not able to comply with the stipulations of said mortgage or is able to make payment in its present condition of the interest accrued on said bond issue, nor of the taxes, levies or assessments already accrued against it, or to pay insurance premiums on insurance as provided by said corporation mortgage to its said bondholders. Your orators further represent that on the 20th day of January, 1909, Gale Justus obtained before J. H. Marshall, justice of Lincoln District, a judgment for the sum of \$165.00 against said Sistersville Brewing Co. with interest and cost as will appear by a copy of said judgment exhibited herewith as exhibit "C" and prayed, &c.

Your orators further represent that on the 20th day of January,

1909, one R. H. Skaggs obtained a judgment before J. H. Marshall, justice, against the said Sistersville Brewing Co. for \$76.00 with interest and cost as will appear by a copy of said judgment exhibited herewith as exhibit "D" and prayed, &c.

That on the 20th day of January, 1909, F. Hogenmiller obtained a judgment before said justice against said Sistersville Brewing Co. for the sum of \$140.00 with interest and cost as will appear by a copy of said judgment exhibited herewith as exhibit "E" and prayed, &c.

That on the 20th day of January, 1909, one G. M. Beaver obtained before the aforesaid justice a judgment against the said Sistersville Brewing Company for the sum of \$53.85 with interest and cost as will appear by a copy of the same marked as exhibit "F" and prayed, &c.

That on the 20th day of January, 1909, one A. Osman obtained a judgment against the said Sistersville Brewing Company before said justice for the sum of \$200.00 with interest and cost as will appear by a copy thereof marked exhibit "G" and prayed, &c.

All of which said judgments as your orators believe are liens upon the real estate of the said Sistersville Brewing Co. but junior to said deed of trust hereinbefore recited which is a lien upon the property of said company as recited.

192 Your orators further represent that executions have been issued upon all of the aforesaid judgments exhibited and that the defendants D. J. O'Neil and Clem Polen have levied upon certain property of the said Brewing Company on the premises of the said company, being a part of the plant and property of the said company and used in connection therewith, all of which was conveyed by said deed of trust and is subject to the said deed of trust and as your orators allege are not liable to levy or attachment under any process of law; that the City Collector of taxes, W. E. Cummins, has levied upon certain articles the property of the said Sistersville Brewing Co. by virtue of unpaid tax bills for the State, County and District taxes for the year 1908; and that said D. J. O'Neil and Clem Polen, constables of Lincoln District, in said County of Tyler, and State of W. Va., and the said collector of taxes in the City of Sistersville and the said ex-sheriff after having made their respective levies, &c., have advertised various articles and pieces of property of the said Sistersville Brewing Company for sale at public auction and unless interfered with or restrained will doubtless proceed to offer the said property for sale in pursuance of their said levies and notices of sale.

Your orators allege that no part of the property levied upon by the said two constables, the City Collector, and ex-sheriff are liable to levy and sale by said executions and said tax bills because the said property is in fact and in effect a part of the real estate and plant of the said Sistersville Brewing Company.

That said ex-sheriff has also levied upon the motors in said brewery which are an essential part of the said plant and that a sale of the property so levied on will work destruction of said brewery plant and irreparably injure and damage the same and so far work a de-

struction of the manufactured beer as that the same will be a total loss.

Your orators further represent that there *is* in the said brewery about eleven hundred barrels of beer manufactured and ready for the market and of the value of about five thousand dollars; that it is necessary that said beer should be handled and put upon the market speedily, otherwise the same will deteriorate and become a total loss.

Your orators further represent that said Sistersville Brewing Company is heavily indebted as hereinbefore stated and recited and in its present condition is probably indebted to the point of insolvency and that it has made the defaults hereinbefore recited because of its inability to earn money with which to keep down the accruing interest and to conduct its business and there is no probability that in its present condition that it would sell for more than enough to pay

193 off and discharge its present bonded indebtedness, or if so, but little beyond its accrued indebtedness; and that they are of the opinion that a receiver should be appointed to take care of the said beer on hands and to sell it for the benefit of the said creditors.

Your orators further show that the said trustee, John S. Sells, has failed and refused and still fails and refuses to act as trustee under the mentioned mortgage although requested in writing so to do, he, said Sells, being cashier of a bank, and cannot leave his business to act as such trustee and refuses to leave his business to act as trustee, and that *if* even if said Brewing Company had the authority under the law to appoint or nominate a trustee as mentioned in said trust, it has not done so but wholly failed and refused and still fails and refuses so to do.

In consideration of the premises and being without remedy at the common law your orators pray that the parties named in the caption of this bill of complaint as defendants may be made defendants of this bill of complaint and for process against them and each of them and in further consideration of the premises they pray that D. J. O'Neill and Clem Polen, constables, and W. E. Cummings, collector of taxes for the City of Sistersville and H. B. Shriver, ex-sheriff of Tyler County may be restrained from selling or offering for sale any of the property levied upon by them and claimed to belong to the Sistersville Brewing Company and now advertised for sale, until further order of your Honor's court; they further pray that the aforesaid mortgage or deed of trust may be foreclosed and the liens of all parties holding liens upon said property of said brewing company may be ascertained and the said property sold under decree of the court for the purpose of paying off and discharging the liens upon the same and that the principal and interest accrued upon said bonds may be provided for in any decree of the court that may be entered herein; they also pray that a receiver may be appointed by your Honor to take charge of said Brewing Company's property and to care for the same and to preserve it pending this suit; and that full authority to handle, and pack the said beer in said brewery and to put the same upon the market and to sell it for the benefit

of the creditors mentioned herein. They also pray for such other relief both general and special as the necessities of their case may require and as to equity seem meet and proper and your orators will ever pray, &c.

GEORGE W. HARTMAN,
BOLLINGER BROS., A CORPORATION,
By Counsel.

ARLEN G. SWIGER,
THOS. P. JACOBS,
Counsel for Complainants.

194 STATE OF WEST VIRGINIA,
County of Tyler, To wit:

I, George W. Hartman, one of the plaintiffs being first duly sworn, says that the facts and allegations herein contained are true, except where they are herein stated to be on information, and that where they are herein stated to be on information he believes them to be true.

GEO. W. HARTMAN.

Taken, sworn to and subscribed before me this seventh day of April, 1909.

J. H. McCOY,
Notary Public.

EXHIBIT "A."

Mentioned in the bill as the Mortgage or Deed of Trust executed by the Sistersville Brewing Company, appears to have not been filed, or is at least now missing.

EXHIBIT "B."

There is no mention in the bill of any such paper as this.

EXHIBIT "C," FILED WITH THE BILL.

GALE JUSTUS
vs.
SISTERSVILLE BREWING CO.

Action Before J. H. Marshall, Justice of the Peace for Lincoln District, Tyler County, West Virginia.

20th day of January, 1909, judgment in above cause rendered in favor of Gale Justus against Sistersville Brewing Co. for the sum of \$165 with interest from this date until paid and costs.

Judgment	\$165.00
Costs	3.70
Total	\$168.70

Credit, —, 189—, by payment, \$—.
Balance due, \$—.

I hereby certify that the above is a true abstract of a judgment rendered before J. H. Marshal, Justice of the Peace as aforesaid, the docket of which is in my possession and control.

Given under my hand this 9th day of April, 1909.

J. H. MARSHALL,
*Justice of the Peace of Lincoln District,
Tyler County, West Va.*

EXHIBIT "D," FILED WITH THE BILL.

R. H. SKAGGS

vs.

SISTERSVILLE BREWING CO.

Action Before J. H. Marshall, Justice of the Peace for Lincoln District, Tyler County, West Virginia.

20th day of January, 1909, judgment in above cause rendered in favor of R. H. Skaggs against Sistersville Brewing Co. for the sum of \$7.600, with interest from this date until paid and costs.

Judgment	\$76.00
Costs	2.80
Total	\$78.80

Credit, —, 189-, by payment, \$—.

Balance due \$—.

I hereby certify that the above is a true abstract of a judgment rendered before J. H. Marshal, Justice of the Peace as aforesaid, the docket of which is in my possession and control.

Given under my hand this 9th day of April, 1909.

J. H. MARSHALL,
*Justice of the Peace of Lincoln District,
Tyler County, West Va.*

EXHIBIT "E," FILED WITH THE BILL.

F. HOGENMILLER

vs.

SISTERSVILLE BREWING CO.

Action Before J. H. Marshall, Justice of the Peace for Lincoln District, Tyler County, West Virginia.

20th day of January, 1909, judgment in above cause rendered in favor of F. Hogenmille against Sistersville Brewing Co. for the sum of \$140.00, with interest from this date until paid and costs.

Judgment	\$140.00
Costs	3.70
Total	<u>143.70</u>

Credit, —, 189-, by payment, \$—.
 Balance due \$—.

I hereby certify that the above is a true abstract of a judgment rendered before J. H. Marshal, Justice of the Peace as aforesaid, the docket of which is in my possession and control.

Given under my hand this 9th day of April, 1909.

J. H. MARSHALL,
Justice of the Peace of Lincoln District,
Tyler County, West Va.

EXHIBIT "F." FILED WITH THE BILL.

G. M. BEAVER
 VS.
 SISTERSVILLE BREWING CO.

Action Before J. H. Marshall, Justice of the Peace for Lincoln District, Tyler County, West Virginia.

20 day of January, 1909, judgment rendered in above cause in favor of G. M. Beaver against Sistersville Brewing Co. for the sum of \$58.85, with interest from this date until paid and costs.

Judgment	\$53.85
Costs	2.80
Total	<u>\$56.65</u>

Credit, —, 189-, by payment, \$—.
 Balance due \$—.

I hereby certify that the above is a true abstract of a judgment rendered before J. H. Marshal, Justice of the Peace as aforesaid, the docket of which is in my possession and control.

Given under my hand this 9th day of April, 1909.

J. H. MARSHALL,
Justice of the Peace of Lincoln District,
Tyler County, West Va.

197

EXHIBIT "G," FILED WITH THE BILL.

A. OSMAN

vs.

SISTERSVILLE BREWING CO.

An Action before J. H. Marshall, Justice of the Peace for Lincoln District, Tyler County, West Virginia.

20th day of January, 1909, judgment in above cause rendered in favor of A. Osman against Sistersville Brewing Co. for the sum of \$200, with interest from this date until paid and costs.

Judgment	\$200.00
Costs	3.70
Total	<u>\$203.70</u>

Credit, —, 189-, by payment, \$—.
Balance due, \$—.

I hereby certify that the above is a true abstract of a judgment rendered before J. H. Marshall, Justice of the Peace as aforesaid, the docket of which is in my possession and control.

Given under my hand this 9th day of April, 1909.

J. H. MARSHALL.

*Justice of the Peace of Lincoln District.**Tyler County, West Va.**Subpoena in Chancery and Marshal's Return.*

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Northern District of West Virginia, Greeting:

You are commanded to summon Sistersville Brewing Company, a corporation, Gale Jusrus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, D. J. O'Neill, Clem Polen, H. B. Shriver, the City of Sistersville, a corporation, and W. E. Cummins, collector and treasurer of Sistersville, W. Va., citizens of and residents in the State of West Virginia, if they be found in your district, to be and appear in the Circuit Court of the United States for the Northern District of West Virginia, aforesaid, at Rules to be held in the Clerk's Office of said Court, at Wheeling, on the first Monday in May next, to answer a certain bill in chancery, now filed and exhibited in said court against them by George W. Hartman, a citizen of Pennsylvania, and Bollinger Bros., a corporation and citizen of Pennsylvania.

Hereof you are not to fail under the penalty of the law thence ensuing. And have then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this ninth day of April, A. D., 1909, and in the 133rd year of the Independence of the United States of America.

Attest:

[SEAL.]

S. R. HARRISON, *Clerk*.

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of May, 1909, otherwise the said bill may be taken pro confesso.

S. R. HARRISON, *Clerk*.

Marshal's Return on Subpœna.

Received this writ at Wheeling, W. Va., April 10, 1909, executed the same at Sistersville, Tyler County, West Virginia, April 12th, 1909, upon the Sistersville Brewing Company, a corporation, by delivering a duly certified copy thereof to Arthur Doyle, Secretary and Treasurer of the said corporation, and a resident of the City of Sistersville, county and state aforesaid, at time of service. No President, Vice-President or other chief officer found in my district upon whom service could be made, for the said Sistersville Brewing Company, etc., executed this writ also the same date at Sistersville, Tyler County, West Virginia, upon the City of Sistersville, a corporation, by delivering a duly certified copy thereof to Thomas Lockney, Mayor of the said City of Sistersville; and the same date at Sistersville, upon Gale Justus; R. H. Skaggs; F. Hogenmüller, G. M. Beaver, A. Osman, D. J. O'Neill, Clem Polen, H. R. Shriver and W. E. Cummins, Collector and Treasurer of the City of Sistersville, by delivering to them in person, a duly certified copy of this writ.

C. D. ELLIOTT,

United States Marshal N. D. W. Va.

Per C. E. WILLIAMS, *Deputy*.

199

Injunction, April 9, 1909.

In Equity.

GEORGE W. HARTMAN et al., Complainants,

vs.

SISTERSVILLE BREWING COMPANY et als., Defendants.

This the ninth day of April, 1909, came the complainants and filed their bill of complaint duly verified by affidavit, praying for relief both general and special and for an injunction, as stated in said bill. On consideration whereof the defendants D. J. O'Neill and Clem Polen, constables of Tyler County, W. Va., H. B. Shriver,

ex-sheriff of Tyler County, W. Va., and W. E. Cummins collector of taxes of said City of Sistersville are hereby restrained temporarily from selling or proceeding to sell the property in the bill mentioned until the further order of the Court, and this cause is set down for hearing on the 20th day of May, 1909, in the City of Clarksburg, W. Va., upon the application of the complainants for a permanent injunction and for the appointment of a receiver as prayed for in the bill.

Before this injunction shall take effect the complainants or some one of them is required to execute bond before the Clerk of this Court in the penalty of \$1,000.00 with approved security.

Enter: Apl. 9, 1909.

ALSTON G. DAYTON, *Judge.*

Injunction, April 9, 1909. Writ.

In Equity.

GEORGE W. HARTMAN et al., Complainants.

VS.

SISTERSVILLE BREWING COMPANY et als., Defendants.

This the ninth day of April, 1909, came the complainants and filed their bill of complaint duly verified by affidavit, praying for relief both general and special and for an injunction, as stated in said bill. On consideration whereof the defendants D. J. O'Neill and Clem Polen, constables of Tyler County, W. Va., H. B. Shriver, ex-sheriff of Tyler County, W. Va., and W. E. Cummins collector of taxes of said City of Sistersville are hereby restrained temporarily from selling or proceeding to sell the property in the bill mentioned until the further order of the Court, and this cause is set down for hearing on the 20th day of May, 1909, in the City of Clarksburg, W. Va., upon the application of the complainants for a permanent injunction and for the appointment of a receiver as prayed for in the bill.

Before this injunction shall take effect the complainants or some one of them is required to execute bond before the Clerk of this Court in the penalty of \$1,000.00 with approved security.

Enter: Apl. 9, 1909.

ALSTON G. DAYTON, *Judge.*

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia, do certify that the foregoing is a true copy of an order entered by said Court on the 9th day of April, 1909, in the cause therein pending in equity in which George W. Hartman and others are plaintiffs and Sistersville Brewing Company and others are defendants. And I do further certify that bond with security has been given by the said plaintiffs as required by said order.

In testimony whereof I have hereto set my hand and the seal of said Court at Wheeling in said District this 9th day of April, 1909.

S. R. HARRISON,

Clerk C. C. U. S. N. D. W. Va.

Marshal's Return of Service of Injunction.

Received this writ at Wheeling, W. Va. April 9, 1909.

Executed the same, the same date at Sistersville, Tyler County, West Virginia, upon D. J. O'Neill, Clem Polen, H. B. Shriver and W. E. Cummins, by delivering to them in person, a duly certified copy thereof.

C. D. ELLIOTT,

United States Marshal, N. D. W. Va.,

Per HAL M. RAPP,

Office Deputy.

201

Petition for Receiver.

Filed April 17, 1909.

To the Circuit Court of the United States for the Northern District of West Virginia:

The Petition of George W. Hartman and Bollinger Brothers, a Corporation, Exhibited in said Court against Sistersville Brewing Company.

Petitioners respectfully represent that on the 9th day of April, 1909, they exhibited their bill in said Court against said Sistersville Brewing Company and others, and obtained an injunction against certain creditors of said company to restrain them from proceeding to sell certain property levied upon by various officers of the County of Tyler, and that said injunction has been set down for the — day of ——— for further proceedings.

Petitioners allege that they are bond creditors of the said Sistersville Brewing Company as more fully set forth in the bill of complaint in said cause; that said company has until recently been conducting the business of manufacturing and brewing beer in the City of Sistersville, but that for reasons unnecessary to state at this time said company besides its bond indebtedness has become very considerably indebted, and not able under the present business depression to pay its debts.

Petitioners further represent that there is now on hand and in the tanks and vats of said Brewing Company something like 1,158 barrels of beer worth, if put on the market, the sum of \$6.50 per barrel; and that said beer can be made ready for the market at small expense; and if not marketed, but allowed to stand without completion it will become sour and spoiled and be entirely ruined, and the

value thereof lost to the creditors of said company; that the only way to save said beer from a total loss would be to start up the ice plant in connection with said brewery, manufacture ice, and keep the temperature of the beer down by means of ice packed around the tanks containing the same; and they believe and allege that said ice plant if operated would produce ice enough that could be sold over and above what might be necessary to be used to preserve the beer and pay the costs of running said ice plant. They further state that they are informed and believe that if said plant is entirely shut down and allowed to stand, without being operated, the machinery and appliances in connection therewith would depreciate very much by reason of rust and other decay.

They allege that with the expenditure of as much as five hundred dollars a sufficient amount of malt could be secured to complete the manufacture of said 1,158 barrels of beer ready for market, and put the same on the market, and that by the sale of said beer any expenditure in completing the same for the market would easily be refunded out of said amount to pay all the expense of operating the brewery for the sales of beer and ice and make a respectable balance to be applied upon the debts of said corporation, but that if said plant is shut down entirely and not operated, there would be a loss to the brewery in the depreciation of machinery, and the total loss of said beer, besides, the cost of a watchman necessary to preserve the plant until the same can be sold; and that unless said ice plant is operated and ice stored to keep the temperature down, the said beer will within a very few days become sour and utterly ruined.

Your petitioners therefore pray that a decree may be entered appointing a receiver to take charge of said brewing plant and to manage and conduct the ice plant in connection therewith with authority to sell the surplus product of ice, and to borrow four, five or six hundred dollars as may be necessary to complete the manufacture of said beer now on hands, and with power and authority to sell the same, and otherwise to manage said brewery plant until there can be a decree obtained for the sale of the same.

And they pray for such other relief as may be necessary and convenient in that respect; and so will they ever pray.

GEORGE W. HARTMAN,
BOLLINGER BROS.,

By COUNSEL.

McCOY & SWIGER,
THOS. P. JACOBS,
Solicitors.

Affidavit of Carl Boger, "Brewmaster."

Filed April 17, 1909.

STATE OF WEST VIRGINIA,

County of Tyler, To wit:

Before me, the undersigned authority in and for said county personally appeared Carl Boger, who being duly sworn for the purpose, says that he moved to the City of Sistersville on or about the fifteenth day of September, 1905; that he superintended the building of the plant of the Sistersville Brewing Co. and installed all the machinery, tanks, etc. therein; that he has had possession of said plant
203 continuously from that date, to-wit, Sept. 15, 1905, to the present date; that he is by occupation a "brewmaster"; that on the twelfth day of May, 1908, he brewed the first beer that has been made in said plant; that said company now has on hands and in stock 1,158 barrels of beer that is worth on an average \$6.50 per barrel; that this beer can be made ready for the market at a small expense; that if this beer is not marketed and is allowed to stand it will sour and spoil and be entirely ruined; that the only way to save this beer from a total loss would be to start up the ice plant, manufacture ice, keep the temperature of the beer down by the use of ice packed in and around the tanks containing same; that the said ice plant in operation will manufacture ice enough that can be sold over and above what will be necessary to be used in the plant to preserve the beer to pay the costs of running said ice plant; that the said brewery cost about \$150,000 that if it was shut up and allowed to stand without being operated the condensers and other machinery in said plant would rust and depreciate in value to the amount of several thousand dollars; that affiant believes that if he had \$500 to \$700 that that would be ample capital to buy malt, etc., to fully place the above 1,158 barrels of beer ready for the market, and that by the sale of the beer he could refund the money, pay all the expenses of operating said brewery from the sales of beer and the ice and make a snug balance to be applied upon the debts of said firm; that if said plant is shut down and not operated there will be a great loss to the brewery in the machinery, that said 1,158 barrels of beer worth \$6.50 per barrel would sour and be a total loss and in addition to this there would be a cost of watchman to preserve the plant until the same is sold; that unless the ice plant is operated and ice stored to keep the temperature down the said beer will sour within a very few days with the usual hot spring weather.

Affiant says that these facts are stated by him upon actual experience and observation; that he is "brewmaster" and is thoroughly familiar with all the details of the manufacturing and brewing beer and that in his judgment unless the plant is continued to be operated there would be a very great loss to the plant, while if operated it can be done with profit.

CARL BOGER, *Brewmaster.*

Taken, sworn to and subscribed before me, and undersigned authority in and for said County of Tyler and State of West Virginia, this 13th day of April, 1909.

JOHN H. McCOY,
Notary Public.

204

Notice of Application for Receiver.

Filed April 17, 1909.

In Equity.

GEO. W. HARTMAN et al.

vs.

SISTERSVILLE BREWING Co. et al.

To said Sistersville Brewing Company:

You will take notice that on the 17th day of April, 1909, the complainants will move the Hon. A. G. Dayton at his chambers at Philippi, W. Va., to appoint a receiver for the property and plant of said Sistersville Brewing Company to take charge of the same, and to put in condition for market and to market and sell the beer now on hand in said Brewery and — that purpose to run and operate said plant of said brewery.

You may be present on said occasion if you so desire.

Yours &c.

GEO. W. HARTMAN,
BOLLINGER BROS.,
By COUNSEL.

Service of the foregoing notice is accepted for and on behalf of the Sistersville Brewing Company by me as the attorney in fact and of record in my county of Tyler, W. Va., the place of my residence this 12 day of April, 1909.

JOHN H. McCOY,
Attorney in Fact and of Record for said Company.

Decree Appointing Receiver, April 17, 1909.

In Equity.

GEORGE W. HARTMAN and BOLLING BROTHERS, a Corporation.

vs.

SISTERSVILLE BREWING COMPANY.

This 17th day of April, 1909, came the complainants, George W. Hartman and Bollinger Brothers by their counsel and filed their petition asking for the appointment of a receiver to take charge of

and manage the plant and property of the defendant, Sistersville Brewing Company; and also at the same time filed the affidavit of Carl Boger the brew-master of said company, of the filing of which petition it appears that the defendant, Sistersville Brewing Company, has had due and ample notice in writing, which notice is also filed in connection with said petition, and the said case upon and
205 application for the appointment of a receiver was duly argued and considered by the court; and the court having been fully advised in the premises it is now hereby ordered adjudged and decreed that J. H. McCoy of the City of Sistersville be and he is hereby appointed a receiver of the plant and property of the said Sistersville Brewing Company, being the property covered by the mortgage trust in the bill in said cause mentioned, brought for a foreclosure of said mortgage, including all the personal and real estate, machinery, wagons, trucks, desks, safes and all other property both real and personal in the City of Sistersville belonging to the said Brewing Company, together with all of the unmanufactured stock on hand, which said receiver shall immediately upon qualification take charge of and preserve the same from waste and deterioration. And it appearing from the said affidavit of the said Carl Boger that there is now on hand and in the tanks in said Brewery about 1,158 barrels of beer of the value of \$6.50 per barrel which has not yet been completed for the market, and that there is danger that if the same is not speedily put in condition for market it will be a total loss to the said Brewing Company. And it appearing to the Court proper that said beer should be put in condition to be put upon the market, and to sell the same, it is therefore ordered, adjudged and decreed that the said receiver do as soon as convenient proceed to complete the manufacture of the said beer and to sell the same; and for that purpose he is authorized and directed to put into operation the ice plant owned and used by the said Brewing Company, and to manufacture the necessary amount of ice to preserve and complete the manufacture of said beer; and he is authorized and directed to manufacture and sell ice to the general public while so operating said Brewery for the manufacture of said beer; and to that end said receiver is hereby authorized and empowered to borrow the sum of five hundred dollars or more, if necessary, not to exceed the sum of six hundred dollars, for the purpose of malt and such other material and ingredients as may be necessary to complete the manufacture of said beer ready for market. And it is hereby declared that any one who shall loan the said receiver said sum of money for said purpose, or if he shall himself advance the same, such person shall have out of the proceeds of the sale of said beer a first and preferential lien to be paid out of the proceeds of the manufactured beer, and the proceeds of the sale of the ice. And the said receiver is authorized to protect and care for the plant of said brewing company; and for that purpose is authorized and empowered to employ a watchman to care for and guard the said plant until said suit can be matured for hearing. And in general, the said receiver is directed and

206 authorized to do all things necessary under this decree to manufacture and to sell said beer, and to manufacture and sell ice from the said ice plant until the further order of the Court. And he is directed further to make full and complete report to the Court of all of his doings under this appointment.

It is further ordered, that before said receiver shall enter upon the discharge of his duties hereunder he shall execute and file with the Clerk of this Court a proper bond with surety or sureties to be approved by said Clerk in the penal sum of \$5,000.00 conditioned for the faithful discharge of his duties as such receiver, and to account for and pay over as required by any future order of this Court all the funds coming into his hands by virtue of his appointment as said receiver.

Said receiver shall also make an inventory of all personal property owned by the said Brewing Company and which is not covered by the aforesaid mortgage, and shall also report each item of expenditure incurred by him while acting as such receiver; and such reports as are herein provided shall be laid before this Court at the June Term thereof, sitting in the City of Parkersburg.

Enter: April 17, 1909.

ALSTON G. DAYTON, *Judge.*

Appearance of City of Sistersville.

By F. L. Blackmar, Solicitor.

Filed May 3, 1909.

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

GEORGE W. HARTMAN et al.

vs.

SISTERSVILLE BREWING COMPANY, a Corporation; GALE JUSTUS, et al.

To S. R. Harrison, Esq., Clerk of the U. S. Circuit Court for the Northern District of West Virginia:

You will please enter my appearance for the defendants, The City of Sistersville, a corporation, and W. E. Cummins, Collector and Treasurer of Sistersville, West Virginia, in the above entitled suit.

Yours &c.

F. L. BLACKMAR,

Solicitor for said Defendants, Sistersville, Tyler Co. W. Va.

In Equity.

GEORGE W. HARTMAN et al.

vs.

SISTERSVILLE BREWING COMPANY et al.

This cause came on this 30th day of October, 1909, to be heard upon the bill of complaint and exhibits therewith filed, process duly served and returned; upon the orders and decrees heretofore entered herein and on the bill of complaint taken for confessed, and was argued by counsel. On consideration whereof, and by consent of all the parties interested in the result thereof, as is indicated by the signatures of counsel at the foot of this decree, it is adjudged, ordered and decreed that J. H. McCoy, Esq., the receiver heretofore appointed herein, do sell at public auction at the front door of the Brewery of said Sistersville Brewing Co. in the City of Sistersville, W. Va., to the highest bidder and for cash, all the property of said Sistersville Brewing Company, situate in said City, consisting of a certain tract, lot and parcel of land in the Fourth Ward of said City, containing seven hundred and forty-one thousandths (.741) of an acre and more particularly described in the exhibits with said bill of complaint, being the same property conveyed to said corporation by Virginia E. C. Roome and E. Roome by deed dated July 25th, 1905; together with the buildings of all kinds and structures thereon erected; and all machinery, fixed and movable, fixtures, appliances, implements and appurtenances of every description, including engines, boilers, ice and refrigerating machines and plants, tanks, casks, cooperage, brewing kettles and utensils, bottling house machinery and all wagons and vehicles, office furnitures, and in fine all the property of the said corporation.

Before proceeding to sell said property, said receiver shall advertise notice of the time, terms and place of sale for five successive weeks in the Daily Oil Review, published in said City of Sistersville, W. Va., and also for the same period in the daily edition of the Gazette-Times, a newspaper published in the City of Pittsburgh, Pa. Before the said receiver shall proceed to sell under this decree or to act thereunder, he shall execute an additional bond in the penalty of \$60,000.00 with security approved by the clerk of this court with condition to perform faithfully and impartially all his duties in executing and carrying out the provisions of this decree and that he will promptly account for and pay over as required by law and any order of the court all moneys which may come to his hands hereunder. And he shall also publish with his notice of sale the certificate of the clerk that such bond has been executed and approved by him. And said receiver shall re-

208 port his proceedings under this decree to a future term of court. And by like consent, it is further adjudged, ordered and decreed that this cause be referred and committed to Geo.

E. Boyd, Jr., Master Commissioner, who shall report to the court the following matters and things, to-wit:

First, the amount of the bonded and mortgage indebtedness of the said Sistersville Brewing Company, its principal and interest and the parties to whom due and the amounts due them, respectively.

Second, all the stockholders of said corporation and the amount of stock owned by each stockholder.

Third, all other indebtedness of said corporation, whether by lien or otherwise, and the persons and amounts.

Fourth, any other matter required by any party and deemed pertinent by said master.

Said master before executing this order shall give notice thereof for a period of five weeks by publishing such notice in some newspaper published in the City of Wheeling, W. Va., once per week for five successive weeks, giving the time and place of his sitting to execute this order and by mailing such notices to each of counsel signing this decree; and for the purpose of executing this decree he shall sit in the City of Wheeling, W. Va. He shall report his proceedings hereunder, with any and all evidence taken by or before him and shall have power to take all evidence and to require the production of all books and papers deemed necessary to make his report complete.

We approve of and consent to the foregoing decree and request its entry by the court, this 22nd day of October, 1909.

ARLEN G. SWIGER,

THOS. P. JACOBS,

*Counsel for the Complainants and
Counsel for All Bondholders.*

A. G. SMITH,

Counsel for Sistersville Brewing Co. & Stockholders.

K. C. MOORE,

Counsel for County Court of Tyler County.

W. E. CUMMINGS,

Collector & Treas. for the City of Sistersville, W. Va.

ARLEN G. SWIGER,

THOS. P. JACOBS,

Counsel for All the Unsecured Creditors

Enter: Oct. 30, 1909.

ALSTON G. DAYTON, Judge.

Petition of Detroit Steel Cooperage Co.

Filed Dec. 22, 1909.

UNITED STATES OF AMERICA,

*Northern District of West Virginia, ss:*In the Circuit Court of the United States for the Northern District
of West Virginia.

GEORGE W. HARTMAN et al.

vs.

SISTERSVILLE BREWING COMPANY et al.

To the Honorable the Judges of the Circuit Court of the United
States for the Northern District of West Virginia, in Equity
Sitting:

The petition of Detroit Steel Cooperage Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, having its principal office and place of business at the City of Detroit, in the County of Wayne and State of Michigan, and a resident and citizen of the State of Michigan, respectfully represents that by an agreement in writing entered into on or about the 8th day of August, 1908, by and between your petitioner and the defendant Sistersville Brewing Company (hereinafter called said Brewing Co.), it was agreed that your petitioner should construct and furnish to said Brewing Co. and erect in the brewery in the bill of complaint in this cause mentioned, situate in the City of Sistersville in the County of Tyler and State of West Virginia, thirteen tanks, with certain fixtures and fittings therein mentioned, in consideration of which said Brewing Co., in and by said agreement agreed to pay to your orator the sum of \$5,480.00 as therein mentioned, and it was in and by said agreement in writing agreed that the title and ownership of all tanks and fixtures covered by said agreement should remain in your petitioner until the payments as therein specified, and any notes and acceptances that might be given on account of any such payments, should have been fully paid, and that in case of default in any of said payments, notes and acceptances, your petitioner should have the right at its option to take possession of and remove said tanks and fixtures.

Your petitioner further represents that *you* petitioner did construct, furnish and erect in said brewery said tanks, fixtures and fittings, in accordance with said agreement; and that said Brewing Co. is indebted to your petitioner, for and on account of
210 the price of said tanks, fixtures and fittings in the sum of \$4,803.02, including interest accrued to the 1st day of December, 1909. Your petitioner further represents that on the 7th day of December, 1908, your petitioner duly caused said agreement in writing to be recorded in the office of the clerk of the County Court of said County of Tyler, in which county said tanks, fixtures

and fittings were and still are, in Deed of Trust Book No. 13, page 346. Your petitioner further represents that said tanks, fixtures and fittings were constructed, furnished and erected, and said agreement in writing made and recorded as aforesaid after the mortgage deed of trust in the bill of complaint mentioned, was executed, delivered and recorded.

Your petitioner further represents that said Brewing Company, after the execution of said mortgage deed of trust in the bill of complaint mentioned, but before the construction, erection or furnishing of said tanks, fixtures and fittings, executed to one Abijah Hays, as trustee, a deed of trust purporting to convey to said trustee substantially the same property as in and by said first mentioned mortgage deed of trust is purported to be conveyed, in trust to secure the payment of a promissory note for the sum of \$10,000.00 payable to one W. H. Kirk, which deed of trust was thereafter, on the 21st day of September, 1907, recorded in the office aforesaid, in Trust Deed Book No. 13, 135, which deed of trust remains unreleased of record, and your petitioner is informed and believes, and on information and belief charges the fact to be, that said note is unpaid.

Your petitioner further represents that said Brewing Company thereafter executed to one Charles Claus, as trustee, another deed of trust purporting to convey substantially the same property, in trust to secure the payment of a promissory note for the sum of \$4,400.00, payable to one Carl Benz, which deed of trust afterwards, on the 29th day of January, 1909, and after the recordation of your petitioner's said agreement, was recorded in said office in Trust Deed Book No. 13, page 361; that said deed of trust remains unreleased of record and your petitioner is informed and believes, and on information and belief charges the fact to be, that said note is unpaid.

Your petitioner further represents that on the 26th day of February, 1909, at a term of the Circuit Court of said County of Tyler which commenced on the Fourth Tuesday in February, 1909, Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger, recovered a judgment against said Brewing Company for the sum of \$3,490.72 with interest and costs, and abstract of which was recorded in the office aforesaid on the 9th day of March, 1909, in Judgment Lien Docket No. 2, page 131; and your petitioner is informed and believes, and on information and belief charges

211 the fact to be that said judgment remains in no manner or part paid, satisfied or reversed. Your petitioner further says that before and at the time of the commencement of the above entitled suit, said Abijah Hays, trustee, W. H. Kirk, Charles Claus, trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger and Aaron Feuchtwanger were and they still are as your petitioner is informed and believes and so charges, residents and citizens of the State of Pennsylvania, of which state the plaintiffs were and are residents and citizens.

Your petitioner further says that John S. Bell, the trustee of the mortgage deed of trust in the bill of complaint mentioned, was before and at the time of the commencement of this suit, and still is, as your

petitioner is informed and believes and so charges, a resident and citizen of the State of Pennsylvania.

Your petitioner further says that, under the color of the decree entered in the above entitled cause, J. H. McCoy, the receiver appointed in said cause, has advertised the property of said Brewing Company for sale on the 11th day of December, 1909, but said sale has been adjourned until the 27th day of December, 1909; that in and by the notice of said sale, said receiver has advertised said tanks for sale, as the property of said Brewing Company and as subject to said decree; and your petitioner has informed said receiver, and said receiver has actual knowledge, of your petitioner's title and ownership in and to said tanks, fixtures and fittings; but that said receiver threatens to, and will unless enjoined and restrained from so doing, ignore the title and ownership of your petitioner and sell or attempt to sell said tanks, fixtures and fittings, to the great and irreparable injury of your petitioner, and in fraud of your petitioner's rights. Your petitioner is informed and believes, and on information and belief charges the fact to be, that the reference under the decree entered in said cause, has not been executed; and your petitioner is advised and so charges that said reference and the execution thereof ought to be stayed, until the joinder of your petitioner and the other persons above mentioned shall permit *the* enable this court to adjudicate all claims in and to the property in the bill mentioned, and to render a decree in accordance with equity and good conscience.

Your petitioner is advised and charges that said decree of sale and reference was and is without jurisdiction and void, as to your petitioner and the residue of the persons not joined as parties to said suit as aforesaid.

Your petitioner further says that it is necessary, in order to assert its title and ownership in and to said tanks, fixtures and fittings, to file in this court an ancillary or dependent bill of complaint, 212 which bill is herewith exhibited; and that said J. H. McCoy as receiver, is a necessary party to said bill.

Your petitioner therefore prays that it may have leave to join said J. H. McCoy as receiver, as a party defendant to said ancillary or defendant bill, and to pray against him such relief as your petitioner may be advised; that said receiver may be ordered to submit himself to this jurisdiction of this court in said cause, as a defendant to said bill; that the execution of said reference under the decree of this court, may be stayed, until the further order of this court; and that your petitioner may have such other and further relief, as equity may require and to your honors may seem meet. And your petitioner will ever pray, etc.

DETROIT STEEL COOPERAGE COMPANY,

Petitioner.

By COUNSEL.

CHARLES N. KIMBALL,
GEO. M. HOFFHEIMER,

Counsel for Petitioner.

UNITED STATES OF AMERICA,
Northern District of West Virginia,
County of Harrison, ss:

George M. Hoffheimer, being duly sworn, on his oath says, that he is of counsel for the above named petitioner, Detroit Steel Cooper-
 age Company; that he has read said petition and knows the contents thereof, and that the same, and the matters and charges therein contained, are true, except so far as they are therein stated to be upon information and belief, and as to those matters and charges he believes them to be true.

GEORGE M. HOFFHEIMER.

Taken, sworn to and subscribed before me, this 21 day of December, 1909.

[SEAL.]

LOUIS A. CARR,
Notary Public.

My commission expires Dec. 9, 1917.

Order of Dec. 22, 1909, Staying Reference, etc.

In Equity.

GEORGE W. HARTMAN et al.

vs.

SISTERSVILLE BREWING COMPANY et al.

This day came Detroit Steel Cooperage Company, by Charles N. Kimball and George M. Hoffheimer, its counsel; and came
 213 also the defendant, Sistersville Brewing Company, the plaintiff, *the plaintiffs*, George W. Hartman and Bollinger Brothers, and J. H. McCoy, as receiver heretofore appointed in this cause, by Thomas P. Jacobs and Arlen G. Swiger, their counsel, and waived notice of the petition and proceedings hereinafter mentioned. And thereupon the said Detroit Steel Cooperage Company tendered and moved for leave to file its petition duly verified under oath, and therewith exhibited the ancillary or dependent bill in said petition mentioned, and moved for an order pursuant to the prayer of said petition, and said motions being argued by counsel and considered by the Court, it is ordered by the Court that said petition be and the same is now here filed. And it is further ordered that said petitioner have leave, and the same is hereby granted to join said J. H. McCoy (by the name of J. Hanford McCoy), as receiver, as a party defendant to said ancillary or dependent bill to be filed in this court, and to pray against said receiver such relief as said petitioner may be advised and that said receiver be and he is hereby ordered to submit himself to the jurisdiction of this Court in said cause, as a defendant to said bill. And it is further ordered that, until the confirmation of the report of sale in this cause, the reference under the decree of this Court, entered on the 30th day of October, 1909, be and the same is hereby stayed.

Enter: Dec'r 22, 1909.

ALSTON G. DAYTON, *Judge.*

Order of Dec. 22, 1909, Directing Separate Bids to be Taken on Tanks, etc.

In Equity.

GEO. W. HARTMAN et al.

vs.

SISTERSVILLE BREWING Co. et al.

This cause came on this 22 day of December, 1909, to be further heard. Upon consideration whereof it is ordered that the decree of sale heretofore entered be so modified as hereinafter recited, to-wit: The special receiver, J. H. McCoy, is directed to offer & receive bids on the Brewing Company plant, exclusive of the tanks, fixtures and fittings, erected in said plant by the Detroit Steel Cooperage Company, and mentioned in the agreement of record in the office of the Clerk of the County Court of Tyler County, West Virginia, in Deed of Trust Book No. 13, page 341, separately, and also to offer & receive bids on said tanks, fixtures and fittings separately, and also

shall offer the plant as a whole & receive bids thereon, and in any case report his bids to the Court. At this time said John S. Sell filed his resignation as trustee.

Enter: Dec'r 22, 1909.

ALSTON G. DAYTON, *Judge.*

Resignation of John S. Sell as Trustee.

Filed Dec. 22, 1909.

Lucien Clawson, President.

John S. Sell, Cashier.

The Westmorland National Bank, Greensburg, Pa.

DECEMBER 20, 1909.

To the Honorable Judge of the Circuit Court of the United States for the Northern District of West Virginia:

George W. Hartman, Bollinger Brothers of Pennsylvania, McCoy and Swiger, Attorneys of Sistersville, W. Va., and all others whom it may concern:

SISTERSVILLE, W. VA.

GENTLEMEN: Whereas, I, John S. Sell of Greensburg, Pa., was appointed a trustee under a deed of trust of The Sistersville Brewing Company, a corporation of West Virginia, which said deed of trust is dated December 1, 1906, and recorded in the Records of Tyler County, W. Va., in Deed Book # 13, page 7, and whereas I am informed that an execution has been issued to foreclose said mortgage, and being informed and advised that as a non-resident trustee, I am unable to act, or rather have no legal standing, as plaintiff in said execution.

And whereas by information received by me, a suit has been instituted in the Circuit Court of the United States for the Northern District of West Virginia by George W. Hartman and Bollinger Brothers of Pennsylvania, plaintiffs against the Sistersville Brewing Company et al., the object of which suit your deponent is informed is to appoint a receiver to sell the plant of the Sistersville Brewing Company aforesaid, together with the real estate of the said company.

Now, your deponent certifies as the trustee, for the benefit of the bondholders of the Sistersville Brewing Company aforesaid, that default has been made in the payment of the interest on the Bonds, no interest ever having been paid, therefore your deponent as trustee of said bonds is of the opinion, that it will be for the best interests of the bondholders that the execution before mentioned
215 be prosecuted to final judgment, and that said execution, in the opinion of your deponent, if not adverse or antagonistic to the very best interest of the bondholders.

Therefore your deponent, not having any standing or authority to act for the bondholders, being a non-resident, wishes to be relieved of any further responsibility in connection with the deed of trust hereinbefore mentioned, reaffirming the statement however, herebefore made, that he believes it to be for the best interests of the bondholders that a sale of the said property be made as soon as possible, in order that they, the holders of the bonds, may have the benefit of such remedy and relief as is consistent with the requirements of the case.

Your deponent wishes to state by way of explanation that when he accepted or became the trustee named in the mortgage hereinbefore indicated, he believed he had full power to so act, and not until recently did he learn that the laws of West Virginia were such, that a non-resident could not do so.

Respectfully,

JOHN S. SELL.

Witness:

GEO. W. HARTMAN.

Report of Sale.

Filed Jan'y 20, 1910.

In the District Court of the United States for the Northern District of West Virginia.

In Equity.

GEORGE W. HARTMAN and BOLLINGER BROTHERS, Plaintiffs,

vs.

SISTERSVILLE BREWING COMPANY et al., Defendants.

I, J. Hanford McCoy, of the City of Sistersville, County of Tyler and State of West Virginia do render the following report of my

proceedings as receiver in the above entitled cause appointed for the purpose of selling the real estate, the plant, etc., of the said Sistersville Brewing Company.

On the 30th day of October, 1909, it was adjudged, ordered and decreed that I, the said J. Hanford McCoy, Receiver, heretofore appointed herein to sell at public auction at the front door of the Brewery of the said Sistersville Brewing Company, in the City of Sistersville, West Virginia, to the highest and best bidder, for 216 cash, the property of the said Sistersville Brewing Company consisting principally of a parcel of land containing seven hundred and forty-one one thousandths (00.741) of an acre, all the buildings and structures thereon erected and all machinery fixed or movable including engines, boilers, tanks, kettles, utensils, etc. Before proceeding to sell said property I was required to advertise a notice of the time, terms and notice of the sale for five successive weeks in the Daily Oil Review published in the said City of Sistersville and also for the same period in the Daily Gazette-Times, a newspaper published in the City of Pittsburg, Pennsylvania, and was also required to give an additional bond in the penalty of sixty thousand (\$60,000) dollars.

Your receiver reports that in compliance with the said order he gave a bond in the penalty of sixty thousand (60,000.00) dollars as aforesaid conditioned for the faithful discharge of his duties as receiver, etc. with F. D. McCoy and H. W. McCoy as surety, which said bond was duly approved by S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia.

Your receiver respectfully reports that on the 4th day of November, 1909, he placed a notice of the sale of said brewery in the said Daily Oil Review of Sistersville and the Pittsburg Gazette-Times of Pittsburg, Pennsylvania, advertising that he would sell the property of the said Sistersville Brewing Company on the 11th day of December, 1909, at two o'clock P. M. that day; that owing to a notice of a motion to be made by the Detroit Cooperage Company the sale was continued until Saturday, December, 18, and said motion not having been heard at that time, the sale was continued until Monday, December, 27, 1909, at the same time and place, said notices of continuance being duly published in both of the aforesaid newspapers.

Your receiver further reports that in the hearing of the motion of the said Detroit Steel Cooperage Company a decree was entered in this cause modifying the decree of sale heretofore entered in which said receiver was directed to offer and receive bids on the Brewing Company's plant exclusive of the tanks, fixtures and fittings erected in the plant by the Detroit Steel Cooperage Company and also to offer and receive bids on said tanks, fixtures and fittings separately and also to offer the plant as a whole and receive bids thereon and report his bids to this court. Your receiver respectfully reports that on the 27th day of December, 1909, in pursuance of the notices published daily as aforesaid in said newspapers, he offered in pursuance of the modified or amended decree of this court, the said Sistersville

Brewing Company's plant complete without the tanks erected in said plant by the said Detroit Steel Cooperage Company and that the highest and best bid that he received for said plant without said tanks, was four thousand (\$4,000.00) dollars, and that said bid was made by Franklin P. Iams, from No. 522 Bakewell Avenue, Pittsburg, Pennsylvania; that your receiver then offered for sale the tanks, fixtures and fittings erected in said plant by the Detroit Steel Cooperage Company separately, and that the highest and best bid received for said tanks separately was five hundred (\$500.00) dollars and that Franklin P. Iams, No. 522 Bakewell Avenue, Pittsburg, Pennsylvania, was the highest bidder therefor; and your receiver then offered the plant as a whole and the highest and best bid received therefor was ten thousand (\$10,000.00) dollars and that the said bidders were S. W. Bollinger, Franklin P. Iams and A. H. Oyer of Pittsburg, Pennsylvania and George W. Hartman of McKeesport, Pennsylvania.

Your receiver would respectfully report that the gentlemen who made the bid of ten thousand (\$10,000.00) dollars for the entire plant are the owners of a large majority of the first mortgage bonds of said plant. Your receiver would also respectfully report that the certificate of the said Pittsburg Gazette-Times and Oil Review publishing companies is herewith filed with the report of your said receiver and that the cost of advertising said sale in said Oil Review as per bill herewith filed, is eighty and 44/100 (\$80.44) dollars, and that the bill of the Pittsburg Gazette-Times for advertising said sale is also herewith filed and is for the sum of \$25.44 and your receiver's commissions on sale is two hundred and nine (\$209.00) dollars.

All of which is respectfully submitted this the 4th day of January, 1910.

J. HANFORD McCOY, *Receiver.*

Pittsburgh Gazette-Times.

McCoy & Swiger, Sistersville, W. Va.:

PITTSBURGH, PA., Jan. 6, 1910.

Nov. 6-'09	Legal—Sistersville Brewing Co.	5 Sat.....	\$16.95
Dec. 11-'09	“ “ “ “	1 “	4.42
“ 25-'09	“ “ “ “	1 “	4.07
			<hr/> 25.44

Pittsburgh Gazette-Times.

McCoy & Swiger, Sistersville, W. Va.:

PITTSBURGH, PA., Dec. 25, 1909.

Legal—Receiver's Sale, Brewery,

1

\$4.07

218

Receiver's Sale of a Fine Brewery.

By virtue of the authority vested in me by a decree entered on the 30th day of October, 1909, in the United States District Court of the Northern District of West Virginia in the chancery cause therein pending in which George W. Hartman, et als. are complainants and the Sistersville Brewing Company et als. are defendants, I will offer for sale at public auction at the front door of the said Sistersville Brewing Co., plant on Wells street in the City of Sistersville, W. Va., to the highest and best bidder therefor for cash in hand on day of sale on Saturday, the 11th day of December, 1909, at 2 o'clock p. m. on that day the following described property to-wit: A tract or parcel of land containing 00.741 acres of land being the same land conveyed by E. Roome et al. to the said Sistersville Brewing Company together with the four story brick brewery building; the one story brick stable and wagon shed; the one story brick office; one story brick bottling house; the steam boilers and engines, ice plant, dynamos, tanks, hops, rice and other stock; cooperage, bottles, boxes, two wagons, harness, a fifteen ton ice plant complete, and all the property of any and every kind owned by the said Sistersville Brewing Company in the City of Sistersville, W. Va. The said plant is complete in all its details, was erected in 1906 and has only been operated as a brewery for a short time. It is run by steam and its own electric plant. Terms of sale cash on day of sale. Title to the property is believed to be good but selling as receiver I will only convey such title as is vested in me by said decree.

Dated this the 4th day of November, 1909.

J. HANFORD McCOY, *Receiver.*

This is to certify that bond with approved security has been given by said J. H. McCoy, receiver, as required by said order of sale.

S. R. HARRISON.

Clerk C. C. U. S., N. D. W. Va.

The above sale is continued until Monday, Dec. 27, 1909, at the same time and place.

J. HANFORD McCOY, *Receiver.*

219

SISTERSVILLE, W. VA., Dec. 30, 1909.

Sistersville Brewing Co. to The Oil Review Publishing
Company, Dr.

Nov.	5.	Notice	Trustees	Sale	362	words	31	times	.....	\$57.01
Dec.	11.	"	"	"	379	"	6	"	.....	11.37
"	17.	"	"	"	402	"	6	"	.....	12.06
										<hr/> 80.44

STATE OF WEST VIRGINIA,
County of Tyler, ss:

I, O. J. Smith of the Daily Oil Review, a newspaper of general circulation, printed and published in Sistersville, Tyler County, West Virginia, hereby certify that the receiver's sale of a fine brewery, a copy of which is here pasted upon the margin, was printed in the additions of said Daily Oil Review, dated Nov. 5th to Dec. 10th inclusive, Dec. 11th to Dec. 17th inclusive, Dec. 18th to Dec. 24th inclusive, and that said notice was published in said paper in the manner and form prescribed by the statute laws of West Virginia governing the publication of such notices.

Witness my hand this 31 day of Dec. 1909.

O. J. SMITH.

Subscribed and sworn to before me this 31st day of Dec. 1909.

A. C. JACKSON, *Notary Public.*

My commission expires Dec. 31st, 1909.

Printer's Fees, \$80.44.

Receiver's Sale of a Fine Brewery.

By virtue of the authority vested in me by a decree entered on the 30th day of October, 1909, in the United States District Court of the Northern District of West Virginia in the chancery cause therein pending in which George W. Hartman, et als. are complainants and the Sistersville Brewing Company et als. are defendants, I will offer for sale at public auction at the front door of the said Sistersville Brewing Co., plant on Wells street in the City of Sistersville, W. Va., to the highest and best bidder therefor for cash in hand on day of sale on Saturday, the 11th day of December, 1909, at 2 o'clock p. m. on that day the following described property, to-wit: A tract or parcel of land containing 00.741 acres of land being the same land conveyed by E. Roome et al. to the said Sistersville Brewing Company together with the four story brick brewery building; the one story brick stable and wagon shed; the one story brick office; one story brick bottling house; the steam boilers and engines, ice plant, dynamos, tanks, hops, rice and other stock; cooperage, bottles, boxes two wagons, harness, a fifteen ton ice plant complete, and all the property of any and every kind owned by the said Sistersville Brewing Company in the City of Sistersville, W. Va. The said plant is complete in all its details, was erected in 1906 and has only been operated as a brewery for a short time. It is run by steam and its own electric plant. Terms of sale cash on day of sale. Title to the property is believed to be good but selling as receiver I will only convey such title as is vested in me by said decree.

Dated this the 4th day of November, 1909.

J. HANFORD McCOY, *Receiver.*

This is to certify that bond with approved security has been given by J. H. McCoy, receiver, as required by said order of sale.

S. R. HARRISON,

Clerk C. C. U. S., N. D. W. Va.

Receiver's Sale of a Fine Brewery.

By virtue of the authority vested in me by a decree entered on the 30th day of October, 1909, in the United States District Court of the Northern District of West Virginia in the chancery cause therein pending in which George W. Hartman, et als. are complainants and the Sistersville Brewing Company et als. are defendants, I will offer for sale at public auction at the front door of the said Sistersville Brewing Co., plant on Wells street in the City of Sistersville, W. Va., to the highest and best bidder therefor for cash in hand on day of sale on Saturday, the 11th day of December, 1909, at 2 o'clock p. m. on that day the following described property, to-wit: A tract or parcel of land containing 00.744 acres of land being the same land conveyed by E. Roome et al. to the said Sistersville Brewing Company together with the four story brick brewery building; the one story brick stable and wagon shed; the one story brick office; one story brick bottling house; the steam
boilers and engines, ice plant, dynamos, tanks, hops, rice and
221 other stock; cooperage, bottles, boxes, two wagons, harness, a fifteen ton ice plant complete, and all the property of any and every kind owned by the said Sistersville Brewing Company in the City of Sistersville, W. Va. The said plant is complete in all its details, was erected in 1906 and has only been operated as a brewery for a short time. It is run by steam and its own electric plant. Terms of sale cash on day of sale. Title to the property is believed to be good but selling as receiver I will only convey such title as is vested in me by said decree.

Dated this the 4th day of November, 1909.

J. HANFORD McCOY, *Receiver.*

This is to certify that bond with approved security has been given by J. H. McCoy, receiver, as required by said order of sale.

S. R. HARRISON,

Clerk C. C. U. S., N. D. W. Va.

This sale has been continued until Saturday, December 18, 1909.

J. HANFORD McCOY, *Receiver.*

Receiver's Sale of a Fine Brewery.

By virtue of the authority vested in me by a decree entered on the 30th day of October, 1909, in the United States District Court of the Northern District of West Virginia in the chancery cause therein pending in which George W. Hartman et als. are complainants and the Sistersville Brewing Company et als. are defendants, I will offer

for sale at public auction at the front door of the said Sistersville Brewing Co., plant on Wells street, in the City of Sistersville, W. Va., to the highest and best bidder therefor for cash in hand on day of sale on Saturday the 11th day of December, 1909, at 2 o'clock p. m. on that day the following described property, to-wit: A tract or parcel of land containing 00.741 acres of land, being the same land conveyed by E. Roome et al. to the said Sistersville Brewing Company, together with the four story brick brewery building; the one story brick stable and wagon shed; the one story brick office; one story brick bottling house; the steam boilers and engines, ice plant, dynamos, tanks, hops, rice and other stock; cooperage, bottles, boxes, two wagons, harness, a fifteen ton ice plant complete, and all the property of any and every kind owned by the said Sistersville Brewing Company in the City of Sistersville, W. Va. The said plant is complete in all its details, was erected in 1906 and has only been operated as a brewery for a short time. It is run by steam and its own electric plant. Terms of sale cash on day of sale. Title to the property is believed to be good but selling as receiver I will only convey such title as is vested in me by said decree.

Dated this the 4th day of November, 1909.

J. HANFORD McCOY, *Receiver.*

This is to certify that bond with approved security has been given by J. H. McCoy, receiver, as required by said order of sale.

S. R. HARRISON,

Clerk C. C. U. S., N. D. W. Va.

This sale has been continued until Saturday, December 18, 1909.

J. HANFORD McCOY, *Receiver.*

The above sale is continued until Monday, Dec. 27, 1909, at the same time and place.

J. HANFORD McCOY, *Receiver.*

Decree of Jan. 20, 1910, Confirming Sale.

In Equity.

GEORGE W. HARTMAN et al.

vs.

SISTERSVILLE BREWING Co., Corporation, et al.

This cause came on this 20th day of January, 1910, to be further heard upon the papers formerly read herein, former orders and decrees, and the report of sale made by Special Receiver, John H. McCoy, of the property and plant of the Sistersville Brewing Company, to which report and sale there are no exceptions, and was argued by counsel.

On consideration whereof it appearing to the Court that after giving notice of the time, terms and place of sale thereof for the

time and in the manner provided in the former decree of sale and its modifications as entered in this cause, the said Special Receiver offered for sale in the various manners provided by said decree herein the property and plant of said Sistersville Brewing Company, and that he received as the highest and best bid for said plant and property the sum of ten thousand dollars (\$10,000.00) from S. W. Bollinger, Franklin P. Iams, A. H. Oyer and George W. Hartman, the parties named in said receiver's report; which said bid the said receiver reports as the best bid received; Therefore it is adjudged, ordered and decreed that said Report be approved and ratified and the said bid of ten thousand dollars made by the aforesaid parties be accepted and the sale to them be confirmed, ratified and held firm and stable; And it is further adjudged, ordered and decreed that said J. H. McCoy, who is hereby appointed specially for the purpose do make, execute and deliver unto the said S. W. Bollinger, Franklin P. Iams, A. H. Oyer and George W. Hartman a good and sufficient deed of conveyance and do thereby convey and grant unto them the said property and plant of the Sistersville Brewing Company so sold to them as aforesaid, together with all of its appurtenances and belongings, being a tract or parcel of land containing 00.741 acres of land being the same land conveyed by E. Roome et al. to the said Sistersville Brewing Company, together with the four story brick brewing building; the one story brick stable and wagon shed; the one story brick office; the one story brick bottling house; the steam boilers, engines, ice plant, dynamo, tanks, hops, rice and other stock cooperage, bottles, boxes, two wagons, harness, a fifteen ton ice plant complete, and all other property of every kind lately belonging to the said Brewing Company.

And it is further adjudged, ordered and decreed that the said receiver do pay the costs, commissions and expenses of this suit as taxed by the clerk including a fee of ten dollars for making the aforesaid deed out of the money in his hands; and the remainder of said purchase money he shall retain in his hands and not dispose of until the future decree of this court, and not until the decision of the court in the case of Detroit Steel Cooperage Company vs. Sistersville Brewing Company et al. now pending in the Circuit Court of the United States for the Northern District of West Virginia on the equity side thereof, and it is further ordered that the plaintiff in said suit to-wit, The Detroit Steel Cooperage Company, shall have the same rights against said fund in the hands of said Receiver as said plaintiff would have had against the specific property described and sued for in its said bill filed in said clause.

Enter: Jan'y 20, 1910.

ALSTON G. DAYTON, *Judge.*

Petition of Receiver to Pay Taxes, etc.

Filed Jan'y 9, 1911.

In the Circuit Court of the United States for the Northern District
of West Virginia.

GEORGE W. HARTMAN and Others, Complainants,

vs.

THE SISTERSVILLE BREWING CO. and Others, Defendants.

Petition by the receiver for authority to adjust, settle and pay the state, county and district taxes for the year 1908, on the real estate and appurtenances on the property mentioned in the complainants' bill. Your petitioner respectfully represents that on or about the 9th day of April, 1910, the said George W. Hartman and others, filed a general creditors' bill in your Honors' court, to assert in the liens existing against the property of The Sistersville Brewing Company, situate in Sistersville, and for the appointment of a receiver to take charge of said property, for the contents of which bill reference is made to said bill of record in this court in this cause.

Petitioner further shows that on the — day of October, 1910, this cause was referred to George E. Boyd, commissioner of said court, to ascertain the liens existing against the property of the said Sistersville Brewing Company, their priorities, etc., but before the order of reference was completed by the said George E. Boyd, the Detroit Steel Cooperage Company filed its bill of equity in said court against George W. Hartman, and others, in which said Detroit Steel Cooperage Company claims title, or reservation of title to certain steel tanks which had been sold and delivered and placed in said brewery, for the Sistersville Brewing Company, as will more fully appear by reference to the bill of the said Detroit Steel Cooperage Company, of record in this court in this cause.

Petitioner further represents that on the 22nd day of December, 1909, an order was entered in this cause, in which order, among other things, is the following: "And it is hereby ordered that, until the confirmation of the report of sale in this cause, the reference under the decree of sale in this court, entered on the 30th day of December, 1909, be and the same is hereby stayed."

Petitioner further says that by an order of your Honor, made in this cause, that on the — day of December, 1909, a decree
225 was entered in this cause directing John Hanford McCoy, receiver of The Sistersville Brewing Company, to sell the plant and real estate of the said Sistersville Brewing Company; that said sale was made, report of sale filed, and on the — day of January, 1910, an order was entered in this cause by your Honor confirming the sale of said plant to S. W. Bollinger and others, for the sum of ten thousand dollars, and directing your receiver to retain the purchase money in his hands and not to dispose of the same until a future decree of this court, and not until the decision of the court in the Detroit Steel Cooperage Company vs. The Sistersville Brewing Company, et al., be disposed of.

Petitioner further says that no order or decree has been made disposing of the petition of the said Detroit Steel Cooperage Company up to this time. Your petitioner further represents that the taxes on the said Sistersville Brewing Company's land and plant in Sistersville, Tyler County, West Virginia, were not paid for the year 1908; that the tax bill for that year on said plant was returned delinquent, and that the said property of the said Sistersville Brewing Company is now advertised to be sold for the non-payment of taxes on the same for the year 1908, at public auction, at the front door of the Court House, Tyler County, West Virginia, between the hours of ten o'clock in the morning and four o'clock in the afternoon, on the 16th day of January, 1911; that the taxes were due on the plant and land owned by said Sistersville Brewing Company, which was sold by your receiver under an order of this Court, which land contains 741/1000 of an acre; that the total of all taxes and interest for said county and district on the said property is \$583.62 and that the total of all taxes, interest, commissions, and expenses of sale, including fee for advertising, amounts to the sum of \$584.32 as will more fully and at large appear by reference to a copy of said advertisement taken from the Tyler County News, a weekly newspaper published in said county, herewith filed and marked "Exhibit A," and prayed to be read and taken as a part of this petition.

Your petitioner further represents that he can pay these delinquent taxes, which would be the first lien against the Sistersville Brewing Company's property, and have ample funds left to pay any judgment the Detroit Steel Cooperage Company might obtain against this fund.

Your petitioner, therefore, prays that an order may be entered directing him to pay the delinquent taxes, interest, costs of advertising, etc., as aforesaid, amounting to \$584.32, against the said property of the Sistersville Brewing Company, now owned by the said Bollinger, and others, out of the fund of ten thousand dollars now in his hands, received from the purchasers of the plant

226 of the said Sistersville Brewing Company, as aforesaid.

J. HANFORD MCCOY,
Petitioner & Receiver.

THOS. P. JACOBS,
ARLEN G. SWIGER,
Solicitors and Counsel for Petitioner.

Sale of Real Estate for Taxes.

Notice is hereby given that the following described tracts or lots of land in the County of Tyler which are delinquent for the non-payment of taxes for the year 1908, will be offered for sale by the undersigned Sheriff at public auction at the front door of the Court House of said County, between the hours of ten in the morning and four in the afternoon on the 16th day of January, 1911. Each tract or lot, or so much thereof as shall be necessary will be sold for so much cash as is sufficient to satisfy the amount due thereon, as set forth in the following table:

Name of person charged with taxes.	Quantity of land.	Local description.	Total tax & int.	Total tax & ex- pense.
Centerville District:				
Henderson, J. L.....	120 p.....	Purgatory Run...	\$0.24	\$0.94
Hibbs, Walter C.....	30 a 90 p.....	Short Run.....	5.10	5.80
Lenon, Susan Est.....	21 a.....	Near Centerville..	2.69	3.39
Smith, Agnes B.....	14 a.....	M. 1 Creek.....	2.88	3.58
Seckman, Martha E.....	7 a 100 p.....	Same.....	2.24	2.94
Ellsworth District:				
Anderson, Robert.....	15 a 85 p.....	Muddy Creek.....	2.05	2.75
Same.....	9¼ a.....	Same.....	1.23	1.93
Altop Lorenza & Archie..	25 a.....	Coal Lick.....	5.60	6.30
Same.....	2 a 139 p.....	Same.....	1.45	2.15
Baker, Effie.....	2 a.....	Ten Mile Creek...	.30	1.00
Same.....	23 a 120 p.....	Same.....	3.62	4.32
Bowser, Homer L.....	28 a 123 p.....	Same.....	6.76	7.46
Same.....	98 a 80 p.....	Same.....	23.54	24.24
Bowser, Marietta.....	52 a 71 p.....	Same.....	9.12	9.82
Cunningham, Nancy L...	1 a 40 p.....	Wolf Pen Run...	.28	.98
Carrack, Rena Bell et al..	10 a.....	Ten Mile Creek...	1.53	2.23
Calvin, Garrett.....	20 a 144 p.....	Same.....	4.25	4.95
Fulmer, A. J.....	80 p.....	Elk Fork Creek..	.25	.95
Flannagan, T. W.....	Lot No. 20.....	Bridgeway .....	.55	1.25
Glendenning, G.W. & Alice.	50 a.....	Ten Mile Creek...	7.83	8.53
Hanks, J. H.....	40 p.....	Same.....	.07	.77
Harter, A. O.....	Lot No. 1.....	Westchester .....	.19	.89
227				
Lemasters, Laura B.....	19 a.....	M. 1 Creek.....	3.10	3.80
Lemasters, Lillie M.....	15 a 20 p.....	Same.....	5.01	5.71
Mercer, Uretta.....	45 a 41 p.....	Big Ben Elk Fork.	3.93	4.63
McAbee, Cora.....	20 a.....	Elk Fork Creek..	3.27	3.97
McQuillen, Ella.....	Lot No. 5.....	Block N. West- chester.....	.19	.89
Roberts, Eli & J. S.....	39 p.....	Elk Fork Creek..	1.02	1.72
Same.....	4 p.....	Same.....	1.11	1.81
Same.....	96 56-100 p.....	Same.....	5.60	6.30
Schamp, Jacob S.....	4 a 53 p.....	Ridge	2.26	2.96
Weekley, G. M., Est.....	38 a.....	Elk Fork Creek..	7.74	8.44
Weekley, Christena.....	6 a.....	.....	.61	1.31
Lincoln Ind. District				
District:				
Buck, Jane.....	138½ p.....	Buck Run.....	.20	.90
Lincoln Ind. District.				
(366):				
Fullmer, Rosa, Rice & Mary.	8 a 120 p.....	Ohio River Hill..	9.58	10.28
Neely, Rosa, Mrs.....	Lot 74x45, 45x88.	Sistersville	42.59	43.29
Ringler, X. B.....	Lots 135-136.....	Same.....	5.43	6.13
Smith, Anthony.....	Lot 22.....	Same.....	23.66	24.36
Sistersville Brewing Co....	741-1000 a.....	Same.....	583.62	584.32
Williams, Elizabeth.....	Lot 59.....	Same.....	9.46	10.16
McElroy District:				
Allen, Samuel.....	1 a 157 p.....	Indian Creek.....	.62	1.32
Campbell, J. P. & Co.....	45 x 50 ft.....	Same.....	3.73	4.43
Clendenning, Wm.....	20 p.....	Stringtown .....	.14	.84
Douglass, R. A.....	5 a 80 p.....	Same.....	.62	1.32

Name of person charged with taxes.	Quantity of land.	Local description.	Total tax & int.	Total tax & ex- pense.
Glover, Alpheus.....	80 p.....	Indian Creek.....	1.16	1.86
Gathers, J.....	2 34-363.....	Same.....	.10	.80
Headley, Thos., est.....	15 a.....	Walnut Fork.....	2.23	2.93
Hennegan, Susan.....	20 p.....	Cranes Nest Run.....	.23	.93
Kenedy, W. J.....	3 787-1089 p.....	Indian Creek.....	.10	.80
Leonard, Charles.....	18000 sq. ft.....	Same.....	.14	.84
McIntire, J. E. & F. E.....	98 a 80 p.....	Same.....	13.77	14.47
McIntyre, A. C.....	40 p.....	Same.....	3.26	3.96
Parks, E. T.....	1 a.....	Same.....	.14	.84
Pitts, Mary E.....	60 a 40 p.....	Same.....	2.63	3.33
Roberts, J. S. et al.....	100 a.....	Jeffrys Run.....	13.97	14.67
Seckman, Frank & James.....	4900 sq. ft.....	McElroy Creek.....	.19	.89
Stoneking, Frank A.....	3 a 49½ p.....	Indian Creek.....	.38	1.08
Smith, Talbert.....	149 p.....	Same.....	.23	.93
Smith, E. V.....	13600 sq. ft.....	Alvy.....	1.63	2.33
Sweeney, O. C.....	Lot.....	McDonaldsville.....	.18	.88
Spencer, B. O.....	125 p.....	McElroy Creek.....	4.66	5.36
Spencer, Alice.....	80 p.....	Same.....	.05	.75
Swiger, Rebecca E.....	28 a 175 p.....	Scotts Run.....	3.50	4.20
Underwood, Samuel.....	92 p.....	Davis Run.....	4.99	5.69
Same.....	1 a.....	McElroy Creek.....	.23	.93
Underwood, M. & A. T.....	13 a 120 p.....	Indian Creek.....	2.06	2.76
Underwood, Elizabeth.....	77 a.....	Georges Run.....	7.89	8.59
Same.....	120 p.....	McElroy Creek.....	.17	.87
White, A. S.....	165 ft.....	Indian Creek.....	.18	.88
Wilbur Store Co.....	3720 sq. ft.....	Wilbur.....	.23	.93
Wright, Perry G.....	1 a.....	Indian Creek.....	.16	.86
Yeater, Marriion.....	40 p.....	Stringtown.....	.23	.93

228

Meade District:

Ankrom, W. H.....	38 p.....	Sugar Creek.....	.54	1.24
Barker, Isaac.....	92 a.....	McKim Creek.....	2.01	2.71
Eddy, C. B. & H. J.....	35 a.....	Johns Run.....	4.67	5.37
Newbrough, Daisy.....	13 a 80 p.....	Sugar Creek.....	.54	1.24
Smith, E. D. & M. D. F.....	50 x 100.....	Plum Run.....	1.63	2.33
Smith, Elijah et al.....	2 a 80 p.....	Sancho Creek.....	.35	1.05
Stanbury, H. M. et al.....	3 a.....	McKim Creek.....	.49	1.19

Union District:

Blonir, Mary Ellen, est.....	75 a 49 p.....	M. I Creek.....	8.44	9.14
Franks, Michael.....	75 x 120 ft.....	Friendly.....	5.13	5.83
Smith, Mary C. S.....	66 p.....	Same.....	37.97	38.67
Same.....	2 a 24 p.....	Same.....	19.52	20.22
Same.....	156 a 31 p.....	Bens Run.....	33.47	34.17
Smith, A. T.....	33½ p.....	Friendly.....	5.99	6.69
Williamson, E. K.....	89 p.....	Same.....	2.98	3.68
Wells, Allen H.....	7 a 37 p.....	Bens Run.....	1.12	1.82
Same.....	6 a 71 p.....	Same.....	1.63	2.33
Well, Allen H. & Sarah E.....	45 a.....	Same.....	13.67	14.37
Wells, N. W. & Martha E.....	45 a.....	Ohio River.....	6.78	7.48

Any of the aforesaid tracts or lots may be redeemed by the payment to the undersigned, sheriff before sale, of the amount due thereon.

Given under my hand this the 8th day of November, 1910.

WILL E. LONG, *Sheriff.*

Order of Jan. 9, 1911, for Payment of Taxes.

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

GEORGE W. HARTMAN and Others, Complainants,

vs.

THE SISTERSVILLE BREWING COMPANY and Others, Defendants.

At this date the petition of the receiver of the Sistersville Brewing Company, John Hanford McCoy, for authority adjust, settle and pay the taxes, assessed against the Sistersville Brewing Company's property, of state, county and district for the year 1908, amounting to \$584.32 having been presented to the court, and the court having fully considered the same, and being fully advised in the premises, it is therefore, ordered that the receiver be, 229 and he is hereby authorized to adjust, settle and pay said taxes, of the amount of \$584.32 to the sheriff of Tyler County, West Virginia, out of the funds in his hands derived from the sale of the Sistersville Brewing Company's property.

Enter: Jan. 9, 1911.

ALSTON G. DAYTON, *Judge.*

UNITED STATES OF AMERICA,

Northern District of West Virginia, ss:

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia do certify that the foregoing is a true copy of the record to this date of the papers on file in said court in the cause therein pending in which George W. Hartman et al. are plaintiffs and Sistersville Brewing Company and others are defendants, except Exhibit "A" of the Bill, which is not found in the files, and also excepting the proceedings upon the reference to a master.

In testimony whereof I have hereto set my hand and the seal of said Court at Wheeling in said District this 20th day of February, A. D. 1911.

[SEAL.]

S. R. HARRISON,

Clerk C. C. U. S., N. D. W. Va.

EXHIBIT "AA," WITH PLAINTIFF'S DEPOSITIONS.

Being the Deed of Trust to John S. Sell, Trustee.

Sistersville Brewing Company

to

John S. Sell, Trustee for National Bank of Greensburg, Pa.

(Deed of Trust, Dec. 1st, 1906, Real Estate and Brewery, Sistersville, West Va.)

This indenture of mortgage, made this 1st day of December, 1906, by and between the Sistersville Brewing Company, of Sistersville, West Virginia, a corporation organized and existing under the laws of the State of West Virginia, having its principal office in the City of Sistersville, County of Tyler and State of West Virginia, 230 hereinafter for convenience sometimes called the Brewing Company, party of the first part, and John S. Sell, now the cashier of the Westmorland National Bank of Greensburg, Pennsylvania, hereinafter for convenience sometimes called Trustee, party of the second part.

Whereas, said Brewing Company, party of the first part, was duly incorporated by Letters Patent under the laws of the State of West Virginia, bearing date the thirty-first (31st) of December, 1904, with an authorized capital stock of one hundred fifty thousand dollars (\$150,000.00); and

Whereas, at a meeting of the stockholders of the said Sistersville Brewing Company, held in pursuance to a notice of such meeting duly published according to law, on the fifteenth (15th) day of November, 1906, said stockholders by a unanimous vote of the stock present, two thirds ($\frac{2}{3}$) of all the stock of said Company being present and represented at said meeting, adopted a resolution authorizing the increasing of the indebtedness of the said Sistersville Brewing Company to forty thousand dollars (\$40,000.00), and

Whereas, at the said stockholders' meeting held as aforesaid, on the fifteenth (15th) day of November, 1906, and at a directors' meeting held concurrent therewith, a resolution was unanimously adopted by said stockholders and directors, authorizing the President and Secretary of said Brewing Company to cause to be made, executed and delivered bonds of the said Brewing Company for an amount not exceeding forty thousand dollars, (\$40,000.00); said bonds to be in such form and to bear such date and such rate of interest, the same to be the lowest that can be arranged for, and to fall due at such times as the President and Secretary may direct; and further authorizing the said President and Secretary to cause to be made, executed and delivered a first mortgage or deed of trust on all the real estate, buildings, machinery, rights, franchises and appurtenances and all the property of the said Brewing Company, conditioned for the payment of such bonds not exceeding

the sum of forty thousand dollars (\$40,000.00), which mortgage or deed of trust was to be made, executed and delivered to any person, bank, trust company or other corporation that the President and Secretary might deem advisable, to secure the full and final payment of such bonds; and

Whereas, the said President and Secretary of said Brewing Company, in pursuance of the authority vested in them by the resolution of the stockholders as above mentioned, have made and issued eighty (80) bonds of the Sistersville Brewing Company, each for the sum of five hundred dollars (\$500.00), numbered consecutively from one to eighty, both inclusive, said bonds bearing date on the first (1st) day of December, 1906, each bond bearing interest at the rate of six (6) per cent. per annum, payable semi-annually, principal and interest to be paid in gold coin of the United States of the present standard of weight and fineness, payable at the Banking House of the Westmorland National Bank, at Greensburg, in the County of Westmorland, State of Pennsylvania; said interest to be payable semi-annually on the first (1st) day of the months of June and December in each year, with coupons attached therefor; said bonds are divided into seven (7) series designated A, B, C, D, E, F, and G, respectively; said series A, consisting of ten (10) bonds, numbered from one (1) to ten (10) inclusive aggregating the sum of five thousand dollars (\$5,000) and all of said series A, to become due and payable on the first (1st) day of December, 1909; series B, consisting of ten (10) bonds, numbered from eleven (11) to twenty (20) inclusive, aggregating the sum of five thousand dollars (\$5,000.00), and all of said series B, to become due and payable on the first (1st) day of December, 1910; series C, consisting of ten (10) bonds, numbered from twenty-one (21) to thirty (30) inclusive, aggregating the sum of five thousand dollars (\$5,000.00), and all of said series C to become due and payable December first (1), 1911; series D consisting of ten (10) bonds, numbered from thirty-one (31) to forty (40) inclusive, aggregating the sum of five thousand dollars (\$5,000.00), and all of said series D to become due and payable on the first (1st) day of December, 1912; series E consisting of ten (10) bonds, numbered from forty-one (41) to fifty (50) inclusive, aggregating the sum of five thousand — (\$5,000.00), and all of said series E to become due and payable on the first (1st) day of December, 1913; series F consisting of fifteen (15) bonds, numbered from fifty-one (51) to sixty-five (65), inclusive, aggregating the sum of seven thousand five hundred dollars (\$7,500.00) and all of said series F to become due and payable on the first (1st) day of December, 1914; and series G consisting of fifteen (15) bonds, numbered from sixty-six (66) to eighty (80) inclusive, aggregating the sum of seven thousand five hundred dollars (\$7,500.00); and all of said series G to become due and payable on the first (1st) day of December, 1915; provided that the said Sistersville Brewing Company shall have the right to redeem any or all of said bonds before the maturity thereof at any interest due date on or after December first (1st), 1907, at the rate of one hundred and five per cent. (105%) of the face value of said

bonds, with interest then accrued, said Brewing Company, however, to give notice of its desire to redeem such bonds to the said John S. Sell, Trustee, and by publication thereof once a week in one newspaper published in the Borough of Greensburg, County of Westmoreland, State of Pennsylvania, for four successive weeks,

232 said notice to be given to said Trustee and the first publication to be made at least sixty days before the date of redemption. The said Sistersville Brewing Company may at its option in lieu of the said notice by publication, give notice to the holders of such bonds by letters addressed to their last known addresses, and after such notice, all interest on such bonds shall cease from and after the next interest due date; said bonds are of the following tenor and effect, except that said bonds shall contain on its face, provisions making it become due and payable according to the time of the series of bonds to which it belongs is made due and payable as hereinafter provided:

"United States of America, Commonwealth of West Virginia, Sistersville Brewing Company. First Mortgage, six per cent. Gold Bond. Loan of \$40,000.00. Know all men by these presents, that the Sistersville Brewing Company of Sistersville, West Virginia, a corporation organized under the laws of the State of West Virginia, is indebted to, and for value received, promises to pay to the bearer hereof, the sum of five hundred dollars, in gold coin of the United States of America, of the present standard of weight and fineness, which sum of the said Sistersville Brewing Company promises to pay to the bearer hereof on the first day of December, —, in like coin as aforesaid, at the office of the Westmoreland National Bank of Greensburg, Pennsylvania, with interest from the first day of December, 1906, at the rate of six per cent. per annum, payable semi-annually, in like gold coin as aforesaid, at the office of the said Westmoreland National Bank, on the first days of June and December respectively, in each year upon presentation and surrender of the annexed coupons as they severally become due; and it is hereby expressly agreed that if default shall be made at any time in the payment of any half yearly installment of interest on this bond, when such interest shall become due and demanded according to the tenor of any coupon hereto annexed, and if such installment of interest shall remain unpaid and in arrears for the period of three months after demand of payment and presentation of the coupons representing the same, the principal debt secured by this bond may be declared and made to become due and payable immediately and in the manner and with the effect provided in the mortgage executed by the said Sistersville Brewing Company to secure the payment thereof. This bond is one of eighty bonds, numbered from one to eighty, both inclusive, each in the sum of five hundred dollars, sub-divided into seven series designated A. B. C. D. E. F. and G. all of said bonds being of like tenor and effect except as to the date of maturity, which is specifically set forth in the mortgage securing said bonds, the payment of which are equally secured by a certain mortgage, bearing even date herewith, duly executed and delivered by said Sistersville Brewing Company to John S. Sell, Cashier of the Westmore-

land National Bank of Greensburg, Penna., as Trustee, which conveys to said Trustee all the real estate, buildings and appurtenances of the said Sistersville Brewing Company, said mortgage being recorded in the office of the clerk of the county court of Tyler County, West Virginia.

The holder by his acceptance hereof agrees that this bond shall be subject to redemption at any interest due date, at one hundred and five per centum of its face with interest then accrued, upon sixty days' notice as in said mortgage provided.

This bond shall not become obligatory on the Sistersville Brewing Company until the certificate endorsed hereon is signed by the trustee.

In witness whereof, the Sistersville Brewing Company has caused this bond to be sealed with its corporate seal and to be subscribed by its president and secretary, and has likewise caused the coupons hereto annexed to be duly numbered and authenticated by the engraved fac-simile of the signature of its Treasurer, at Sistersville, Tyler County, West Virginia, this first day of December, 1906.

SISTERSVILLE BREWING COMPANY.

By A. E. BENFORD, *President*.

Attest:

W. H. KIRK, *Secretary*.

Trustee's Certificate.

I hereby certify that this bond is one of the bonds described in the within mentioned mortgage, or deed of trust.

JOHN S. SELLS, *Trustee*.

The said coupons to said bonds being in form substantially as follows: Sistersville Brewing Company will pay to bearer on the first day of June, 1907, at the office of the Westmoreland National Bank of Greensburg, Pennsylvania, fifteen dollars (\$15.00), in gold coin of the United States being six months' interest due that day on its first mortgage six per cent. Gold Bond No. —.

A. R. DOYLE, *Treasurer*.

The remaining coupons being in the same form except as to the dates of payment thereof; and

234 Whereas, at the said meeting of the stockholders and directors, hereinbefore referred to, a resolution was duly passed authorizing the making, execution and delivery of a first mortgage or deed of trust for the sum of forty thousand dollars, (\$40,000.00) upon all the real estate, buildings, machinery, franchises and appurtenances and upon all the property of the said Brewing Company to secure the payment of the said sum of forty thousand dollars (\$40,000.00); and by resolution duly adopted the President and Secretary of the said Brewing Company were authorized to sign, seal, and deliver the said bonds and said mortgage or deed of trust to secure said bonds:

Now This Indenture Witnesseth: That the said party of the first part, as well for and in consideration of the premises as of the sum of one dollar (\$1.00) in hand paid by the said Trustee, the party of the second part, to the Brewing Company, the party of the first part, the receipt of which is hereby acknowledged, as for the securing the payment of the principal and interest of said eighty (80) bonds issued as aforesaid and secured hereby, has granted, bargained, sold, aliened, enfeoffed, released, confirmed, assigned, transferred and set over and by these presents does grant, bargain, sell, alien enfeoff, release, confirm, assign, transfer, and set over to the said Trustee, the party of the second part, his successors or assigns, as hereinafter mentioned, the following described real estate, that is to say: All that certain tract or parcel of land, situate, lying and being in the Fourth Ward of the City of Sistersville, in the County of Tyler, State of West Virginia, more particularly bounded and described as follows, to-wit: Beginning at a drill hole in the curbstone on the Northward side of Carter Street and the Eastward side of the B. & O. R. R., right of way, and running thence S. 56° 50' E. along the Northward bound- of said Carter Street, about 146.90 feet to a drill hole in the curbstone at the Westward side of North Wells Street, about 229.2 feet to a drill hole in the curbstone, being the corner of land belonging to Margaret Thoenen; thence N. 60° 17' W. along the line of land of said Margaret Thoenen, about 141.4 feet to a stake, being the corner of the right of way of the B. & O. R. R.; thence S. 29° 07' W. along the eastward bound- of said B. & O. R. R. right of way, about 220.2 feet to the place of beginning; containing seven hundred and forty-one one-thousandths (00.741) acres of land, being the same land conveyed to the said Sistersville Brewing Company by Virginia E. C. Roome and E. Roome, her husband, by deed dated the 25th day of April, 1905, and recorded in the office of the Clerk of the County Court of Tyler County, West Virginia, in Deed Book No. 61, page 28.

Together with the Brewery and all the buildings, machinery and appliances thereon erected or to be erected, with all the appurtenances thereto belonging or in any wise appertaining and together with the corporate rights and privileges of the said Brewing Company, the first party.

To have and to hold the same with the appurtenances unto the party of the second part and his successor or successors and assigns, in the execution of any of the powers hereby granted, to and for his interest, use and behoof; but in trust nevertheless, for the use, benefit and security as hereinafter mentioned, of the parties who may become the holders of said bonds intended to be hereby secured, or any of them without preference, priority or distinction whatever to any holder or holders of such bond or bonds, subject to the rights of the party of the first part, its successors or assigns, to retain free and uncontrolled use, enjoyment, possession and management of said premises, until said party of the second part or his successor or successors as such Trustee, is authorized to enter upon or sell the same as hereinafter set forth, and for the more full and distinct expression of the trust hereby created, and in definition of the obli-

gations imposed on said Trustee, it is hereby declared, agreed and covenanted by and between the parties hereto, the party of the first part covenanting as well for itself as for its successors and assigns, and the party of the second part covenanting as well for himself as his successors and assigns in said trust, in the manner following:

First. The party of the first part will punctually pay to the holders of the bonds aforesaid intended to be hereby secured or any that may be issued in lieu, renewal or substitution of the same, respectively, the interest thereon semi-annually, as the same may become due and payable according to the terms in said bond set forth, and on the dates therein respectively mentioned for the payment of the same; and will also, upon the dates and time mentioned in said bonds, respectively, whereon the principal sum of said bonds shall according to the provisions thereof, respectively, become due and payable, fully and entirely pay off and satisfy as aforesaid, the whole of said bonds, both principal and interest without further delay, and will also pay any and all lawful taxes, charges and assessments that may be laid, levied or assessed upon the said Brewery real estate and premises hereby mortgaged or intended or agreed so to be, or upon the said corporation its property and franchises, so as to save the estate hereby granted from perils of sale or forfeiture for non-payment of such taxes, charges or assessments, and will also pay for such policies of insurance on said Brewery and other property covered by this mortgage, or intended so to be, on behalf of the second party, as the party of the second part, his successor or successors, may from time to time demand, to

236 an amount not exceeding sixty thousand dollars (\$60,000.00) except by consent of said first party, and in case of any loss, destruction or damage occurring by any peril covered by said insurance, the amount of such policy or policies when paid, if sufficient with other funds of said party of the first part to repair or rebuild said Brewery or other property so destroyed or damaged, shall be appropriated for that purpose; and if not sufficient therefor, then it shall be used for benefit or payment of the bonds secured by this mortgage; and that said first party will pay annually the tax levied on said bonds by the State of Pennsylvania, until said bonds are paid off and discharged, payment to be made each year to John S. Sell, Cashier, at Greensburg, Pennsylvania, or to such other person or corporation as the said Trustee may designate, said bonds to be "free of tax" for the full period for which they are given.

Second. That if the party of the first part, its successors or assigns, shall hereafter at any time after demand made, make default or refuse, neglect or omit for any time exceeding three (3) months to pay the semi-annual interest on said bonds intended to be hereby secured or any part of them, or shall after demand, make default, refuse, neglect or admit for any period exceeding three (3) months to pay the principal sum of each and all of said bonds intended to be hereby secured, or any of them, when and as the same shall become due and payable, or shall neglect, refuse or omit to pay any lawful taxes, charges or assessments that may be laid, levied or assessed upon the said Brewery, real estate and premises hereby

mortgages or intended or agreed so to be, or upon said corporation, its property or franchise, so that the estate hereby granted may or shall be in peril of sale or forfeiture for non-payment thereof, or shall neglect or refuse to pay for such insurance as the second party may, in accordance with the terms hereof, require, or shall neglect or refuse to pay the tax levied on said bonds by the State of Pennsylvania, then and in every such case the said trustee, or his successors in said trust, for the time being, shall and will, upon the written request of the holder or holders of a majority of the said bonds then outstanding, enter upon and take possession of said Brewery, real estate, premises and property hereby mortgaged, or agreed and intended so to be, and shall and will thereupon use, manage and control said Brewery, premises and property, possession of which may be so taken, to the best advantage, receive and take all stocks, amounts due and incomes thereof, and appropriate the net income and proceeds therefrom, after deducting all payments for taxes, liens or charge prior to the lien of these presents, as well as the expenses of the trust, and such sum or sums

237 as may be sufficient or proper to indemnify the trustees thus acting against any liability or loss or damage or on account of any matter or thing done by the trustee in good faith, in pursuance of his duty as trustee, without any preference, priority or distinction to one bond over another, (first) to the interest due upon, and (second) to the principal of all the aforesaid bonds then outstanding, and intended to be hereby secured, in full if the said income be sufficient, but if not, then pro rata, or the said trustee shall and will, after, or without entering upon or taking possession, upon the written request of the holder or holders of the majority of said bonds, then outstanding, proceed to sell said Brewery, real estate, premises and property hereby mortgaged or agreed or intended so to be, to the highest bidder at public sale in the City of Sistersville, West Virginia, after giving three (3) months' notice of such intended sale, by publication to be made once a week in at least two daily newspapers published in the City of Pittsburg, Pennsylvania, and in one newspaper published in Sistersville, Tyler County, West Virginia, and by not less than twenty (20) hand bills posted in conspicuous places in the said City of Sistersville; and shall grant and convey the said Brewery real estate, premises and property to the purchaser or purchasers at such sale, free from all and every of the trusts hereby created and without any liability on the part of the purchaser or purchasers to see to the application of the purchase money; and shall and will appropriate such purchase money; after payment of taxes, liens or charges prior to the lien of these premises, as well as the expenses of the trust, and of indemnity to the trustee, as aforesaid, (first) to the interest due upon, and (second) to the principal of said outstanding bonds in full if said purchase money shall be sufficient, but, if not, then pro rata, without any preference, priority or distinction of one bond over another, and in case there should remain in the possession of the said Trustee any portion of the trust estate or proceeds thereof after payment in full of the principal and interest of aforesaid

bonds, together with such prior liens, expenses and indemnity, then said Trustee shall re-convey, transfer and pay over to the said party of the first part, its successors or assigns, for its sole use and benefit, such remaining portion of said trust or proceeds thereof; it being distinctly understood and agreed that in the event of any entry upon or taking possession of said Brewery, real estate, premises and property hereby mortgaged or agreed or intended so to be, or in the event of any sale thereof by the said Trustee, then, and in either such case, the whole principal sum of each and all of said bonds then out-standing, and intended to be hereby secured, shall forthwith become due and payable.

238 Third. The party of the first part shall and will from time to time hereafter, upon the demand of the said Trustee, or his successors for the time being, grant, convey, assign, transfer and set over unto the said trustee all of said real estate, and also all rights, privileges and easements which said party of the first part may hereafter acquire, as appurtenant to and for the business of said Brewery, and shall and will also make, seal, execute and deliver, or cause to be made, executed and delivered all and every such further acts, matters, things, deeds, conveyances and assurances in law, for the better assuring, conveying and conforming unto the said Trustee, or unto his successors for the time being, all and singular hereditaments and premises, estate and property hereby conveyed, or intended so to be or which are covenanted or agreed to be hereafter conveyed to the said Trustee, or by his counsel learned in the law, shall be demanded or desired for the better effectuating and carrying out all provisions, objects and purposes of this mortgage, and for securing the payment of the principal and interest of the bonds intended to be hereby secured, all of which estate shall be held by the said Trustee, or by his successors for the time being, in the trust, in, under and upon the specific and respective trusts, and for the uses and purposes, and subject to the power and authority herein declared, given and expressed.

Fourth. That in the event of the resignation, neglect, refusal or incapacity to act of the Trustee herein named, or any successor or successors in the trust, the party of the first part shall have full power and authority to nominate and appoint a new trustee or trustees for the purpose of filling the vacancy so caused and supply the place of such trustee so resigning, neglecting, refusing or becoming incapacitated or incapable to act, and the said trustee or trustees so nominated and appointed shall take upon himself or themselves the same trust and have the same powers, and be subject to all the other stipulations and conditions as are hereby agreed and declared to belong, and extend to, and be performed and executed by, and as fully as they can, may, might or could be, by the said John S. Sell, Cashier of the Westmorland National Bank, of Greensburg, Pennsylvania, and the like nomination and appointment shall and may be made and carried into effect in like manner, and as often from time to time as there may be occasion therefor, and with the same effect as before mentioned.

Fifth. It is hereby further covenanted and agreed as aforesaid

that this trust is accepted upon the express condition that the said trustee shall not, nor shall any future trustee or trustees incur any liability or responsibility whatever by permitting said party
239 of the first part to retain or be in possession of said Brewery, real estate, premises or property hereby mortgaged, or agreed or intended so to be, or any part thereof, and to use and enjoy the same, nor shall said trustee or any future trustee or trustees be, or become liable or responsible for any destruction, deterioration, loss, injury or damage which may occur or be done to the said Brewery, real estate, premises or property hereby mortgaged, or intended so to be, either by the said party of the first part, or its agents or servants, or by any person or persons, whomsoever, nor shall any trustee or trustees, present or future, be in any way liable or responsible for the consequence of any breach on the part of the party of the first part, or of any of the covenants herein contained, nor for any act of the said party of the first part, its agents or servants; nor shall said Trustee or Trustees, present or future, be or become liable or responsible for any cause, matter or thing, except his, their, or its own wilful and intentional breach of the trust herein expressed and contained.

It is further understood and agreed that the Trustee, for himself and his successors, assumes the duties herein created only upon the following terms and conditions, to-wit:

(A) The Trustee shall be protected in acting upon any notice, request, consent, certificate, bond or other paper or document, believed by him to be genuine and to have been signed by the proper party.

(B) The Trustee shall not be obliged to take notice of any default on the part of the Brewing Company until he has received written notice thereof, signed by holders of at least ten per cent. on the bonds outstanding hereunder.

(C) The Trustee shall be under no obligation or duty to perform any act hereunder, or defend any suit in respect hereof unless reasonably indemnified. Except as herein expressly otherwise provided, the Trustee shall not be bound to recognize any person as a bond holder unless, nor until, his bonds are submitted to the Trustee for inspection, if required, and his title satisfactorily established, if disputed.

(D) It shall be no part of the duty of the Trustee to file or record this indenture, or to procure any other, further or additional instrument in furtherance thereof or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such a lien, or for extending or supplementing the same; nor shall it be any part of his duty to procure insurance against fire or
240 any other damage or loss to any portion of the property mortgaged, or to renew any policies of insurance or to keep himself informed as to the payment of any taxes or assessments, or to require such payment to be made; but the Trustee may, in his discretion, do any or all of these things.

(E) The Trustee or any successor or successors hereafter ap-

pointed, may resign and be discharged of the trusts hereby created, by written notice hereof to the Brewing Company, and by publication at least once in each week for four (4) successive weeks in a newspaper published in the City of Pittsburg, Pennsylvania, and for a like number of times in a newspaper published in Tyler County, West Virginia, and by due execution of a conveyance of the trust estate to such person or corporation as may be designated by the Brewing Company, or in lieu of such conveyance a new trustee may be substituted and appointed by a proper order of the Circuit Court of Tyler County, West Virginia.

Sixth. And whereas the date of the execution of the mortgage and trust by the various parties hereto, may be subsequent to the day of which it bears date.

Now it is hereby expressly declared and agreed that this indenture of mortgage and trust shall be dated the 1st day of December, A. D. 1906, and it shall be valid and effectual as if executed on the day of the date hereof, and that this indenture of mortgage and trust is the indenture and mortgage referred to in the bonds, the form whereof is hereinbefore set forth, and is made and executed by and between the parties hereto, as and for the indenture of mortgage and trust securing and intending to secure said bonds. Provided also, nevertheless, that the said parties of the first part, its successors or assigns, shall and do, well and truly pay, or cause to be paid unto the person or persons, corporation or corporations, who shall be and become holders of the said bonds intended to be secured hereby, the several and respective sums expressed therein, on the days and times hereinbefore appointed for the payment thereof, together with the lawful interest on the same, according to the provisions recited in said bonds and in accordance with the provisions thereof, and shall and will pay all lawful taxes, charges and assessments as hereinbefore provided, without any fraud or further delay, then and from thenceforth as well as this present indenture, and the estate and property hereby granted, conveyed or agreed so to be, and said bonds, shall become void and of no effect, anything hereinbefore contained to the contrary notwithstanding, and satisfaction shall be forthwith duly entered by the said trustee or trustees for the time being, upon the record of this indenture
241 of mortgage, and a legal, proper and sufficient deed of release shall be executed by the trustee and delivered to first party, releasing the lien hereby created.

In witness whereof, the said Sistersville Brewing Company has caused its corporate name to be signed hereto by its President, and has hereunto affixed its common and corporate seal, and in attestation thereof the Secretary of said Corporation has hereunto affixed his signature at Sistersville, West Virginia, the day and year first above written.

SISTERSVILLE BREWING COMPANY,
By A. E. BENFORD, *President*.

[Corporate Seal, 1904.]

W. H. KIRK, *Secretary*.

STATE OF WEST VIRGINIA,

Harrison County, To wit:

I, Melvin G. Sperry, a Notary Public of the said County of Harrison, do certify that A. E. Benford personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the President of the Sistersville Brewing Company, the corporation described in the writing hereto annexed, bearing date the first day of December, 1906, authorized by said corporation to acknowledge deeds and other writings of said corporation that the seal affixed to said writing is the corporate seal of the said Corporation; and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. E. Benford acknowledged the said writing to be the act and deed of the said corporation.

Given under my hand this 22nd day of January, 1907.

MELVIN G. SPERRY,

Notary Public.

Clerk's Office of the County Court of Tyler County, West Virginia.

The foregoing writing bearing date on the 1st day of December, 1906, with the certificate of acknowledgment thereto annexed, was presented for and by me duly admitted to record in said office and county, as to the parties therein named, this 2nd day of February, 1907, at 2 o'clock p. m.

Attest:

J. W. DUTY, *Clerk.*

242 STATE OF WEST VIRGINIA,

*Clerk's Office of the County Court**of Tyler County, ss:*

I, J. W. Duty, Clerk of the County Court of Tyler County, in said State, do hereby certify that the foregoing is a true copy of a deed of trust or Mortgage given by the Sistersville Brewing Company to John S. Sell, trustee for the National Bank of Greensburg, Pa., as the same is duly of record in the clerk's office aforesaid, as appears at page- 7 to 16 Deed of Trust Book No. 13.

Given under my hand and the seal of said County Court, this the 28th day of January, 1911.

[SEAL.]

J. W. DUTY, *Clerk.*

EXHIBIT "AB" WITH PLAINTIFF'S DEPOSITIONS, BEING DEED OF TRUST TO ABIJAH HAYS, TRUSTEE.

Sistersville Brewing Company
to
Abijah Hays, Trustee, for W. H. Kirk.

*(Deed of Trust on 741/1000 Acres and Personal Property
\$10,000.00.)*

This Deed, Made the first day of August, 1907, between the Sistersville Brewing Company, a corporation created and existing under and by virtue of the laws of the State of West Virginia, having its principal office in the City of Sistersville, West Virginia, of the first part, and Abijah Hays, Trustee, of Parkersburg, West Virginia, of the second part, and W. H. Kirk, M. D., of Pittsburg, Pennsylvania, of the third part.

Whereas, at a meeting of the Board of Directors of said Sistersville Brewing Company, held on the third day of July, 1907, the following resolution was passed by the said Board of Directors, to-wit: "Resolved, that this Company secure a loan of ten thousand dollars (\$10,000.00) for one year from Dr. W. H. Kirk and that the *presided* and treasurer be hereby authorized to execute a note for ten thousand dollars (\$10,000.00) in favor of W. H. Kirk, and secure the payment of said note by deed of trust on the real estate, personal property, etc., of the Sistersville Brewing Company," and, Whereas, pursuant to the said resolution and the authority thereby vested in them the said president and treasurer have secured said loan of ten thousand dollars (\$10,000.00) from said W. H. Kirk, and have executed therefor the note of said Sistersville Brewing Company, payable to the order of said W. H. Kirk one year after date.

Now, therefore, this deed witnesseth: That for and in consideration of the premises, and the sum of five dollars (\$5.00) cash in hand paid, the receipt whereof is hereby acknowledged, and the matters hereinafter contained, the said Sistersville Brewing Company does hereby grant, bargain, sell and convey unto the said Abijah Hays, trustee as aforesaid, with covenants of general warranty all that certain lot, tract or parcel of land, lying and being in the Fourth Ward of the City of Sistersville, County of Tyler and State of West Virginia, bounded and described as follows, to-wit: Beginning at a drill hole in the curbstone on the northward side of Carter street and the eastward side of the Baltimore and Ohio Railroad Company's right of way, and running thence S. 56 deg. 50 min. e. along the northward bound of said Carter street, about one hundred and forty-six and nine-tenths (146.9) feet to a drill hole in the curbstone at the westward side of North Wells street; thence N. 27 deg. 55 min. e. along the westward bound of said North Wells street, about two hundred and twenty-nine and two-tenths (229.2) feet to a drill hole in the curbstone, being a corner of land owned

by Margaret Thoenen; thence N. 60 deg. 17 min. W. along the line of the land of the said Margaret Thoenen, about one hundred and forty-one and four-tenths (141.4) feet to a stake, being corner on the right of way of the Baltimore and Ohio Railroad Company aforesaid; thence S. 29 deg. 7 min. W. along the eastward bound of said Baltimore and Ohio Railroad Company's right of way, about two hundred and twenty and two-tenths (220.2) feet to the place of beginning, containing seven hundred and forty-one thousandths (.741) of an acre of land, more or less, and being the same property conveyed unto the said Sistersville Brewing Company by Virginia E. C. Roome and E. Roome, her husband, by deed bearing date the 25th day of July, 1905, and recorded in the office of the Clerk of the County Court of said Tyler County, West Virginia, in Deed Book No. 61, pages 28 and 29, together with the buildings and structures now located thereon, or which may — hereafter erected and built thereon; and in addition to the aforesaid real estate the said Sistersville Brewing Company does hereby grant, bargain, sell, assign and transfer unto the said Abijah Hays, trustee as aforesaid, all machinery, both fixed and movable, fixtures, appliances, implements, and appurtenances of every description, which are now owned or may be hereafter acquired by said Brewing Company and used or provided for in the operation of its plant or carrying on its

244 business, including engines, boilers, ice and refrigerating machines or plants, tanks, casks, and cooperage, brewing kettles and utensils, bottling house machinery of every description, and all wagons and horses owned by said company and used in carrying on its business. To have and to hold unto the said trustee, or his successors, in trust to secure the said W. H. Kirk, party of the third part, the payment of a certain indebtedness of ten thousand dollars (\$10,000.00), that being the amount of the loan advanced by said W. H. Kirk to the said Sistersville Brewing Company, as hereinbefore mentioned with interest thereon from the & day of —, 1907, at the rate of six per centum per annum, which said indebtedness is evidenced by a promissory, negotiable note bearing date the — day of —, 1907, executed in behalf of said Sistersville Brewing Company by its president and attested by its Treasurer, duly authorized as hereinafter set forth, payable one year after date to the order of W. H. Kirk, at — Bank of Sistersville, West Virginia, with interest.

Now, if the said Sistersville Brewing Company shall make default in the payment of said indebtedness, or interest thereon, in accordance with the terms and tenor of the promissory, negotiable note given in evidence of said indebtedness, or, in the event said indebtedness, or any part thereof, shall be continued beyond the period of one year as specified in aforesaid note, by agreement of said party of the first part and the said party of the third part, if the said Sistersville Brewing Company shall make default in the payment of any renewal or renewals thereof, or for any part thereof, and the interest thereon, in accordance with the terms and tenor of any note or notes given in evidence of said indebtedness, or any part thereof, then upon the request of the said W. H. Kirk, or the legal holder of

said note, or any note or notes given in renewal thereof, or for any part thereof, it shall be the duty of said trustee, or his successor, to enter upon and take possession of, and advertise and sell at public auction at or upon the premises herein described, the property hereby granted and assigned for cash, and out of the proceeds of such sale the trustee shall first pay the necessary costs and expenses attending the execution of this trust, second, the trustee shall pay unto the said W. H. Kirk, —, or his lawful assignee the full amount of said loan or indebtedness, together with all interest accrued thereon, and all moneys, together with interest thereon from the date of payment, which the said W. H. Kirk, — or his lawful assignee, may have paid for taxes, assessments, insurance, fees, or other expense necessarily incurred in protecting said property during the continuance of said loan, after deducting therefrom any proper credits which may have been paid thereon. The balance, if any, the trustee shall pay to the party legally entitled thereto.

It is stipulated that the said Sistersville Brewing Company shall keep the herein granted property insured for the benefit of the beneficiary under this trust in the sum of — dollars (\$—), and shall regularly pay all taxes thereon, and all assessments legally made against said property; upon the failure so to do, the beneficiary hereunder may cause the property to be insured in an amount not to exceed the above named sum, and may pay said taxes and assessments; and the amount so paid shall bear interest from the time of payment, and be deemed a part of the indebtedness secured by this deed of trust.

It is further stipulated that in executing this trust in accordance with the provisions herein contained, it shall not be necessary for the trustee, in the event of a sale hereunder to be present except by attorney or agent. If it be deemed by the trustee to the interest of all parties any sale hereunder may be adjourned from time to time, and public outcry at the time and place appointed shall be sufficient notice of the said adjournment without other notice or publication. And except as it is herein otherwise specifically provided, this deed of trust and the execution of the trust thereunder shall be governed by the present existing laws of the State of West Virginia relating to deeds of trust and sales thereunder.

In witness whereof, the said Sistersville Brewing Company has hereunto caused its corporate seal to be affixed and these presents to be signed in its behalf by its president and its treasurer, duly authorized.

[CORPORATE SEAL.]

SISTERSVILLE BREWING COMPANY,
By A. E. BENFORD, *President*,

Attest:

A. R. DOYLE, *Treasurer*.

STATE OF PENNSYLVANIA,

County of Allegheny, To wit:

I, Jas. T. Euwer, a Notary Public of said County and State, do certify that A. E. Benford personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the president of the corporation described in the writing above bearing date on the first day of August, 1907, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to said writing is the corporate seal of said corporation, and that said writing was
 246 signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. E. Benford acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 22 day of Aug., 1907.

[NOTARIAL SEAL.]

JAS. T. EUWER,

Notary Public.

My commission expires February 2nd, 1910.

STATE OF WEST VIRGINIA,

County of Tyler, To wit:

I, Clifford V. Church, a Notary Public of said county of Tyler, do certify that A. R. Doyle personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the Treasurer of the corporation described in the writing hereto annexed, bearing date the 1st day of August, 1907, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation; that the seal affixed to said writing is the corporate seal of said corporation, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given.

And the said A. R. Doyle acknowledged the said writing to be the act and deed of the said corporation.

Given under my hand and official seal this 31st day of August, 1907.

[NOTARIAL SEAL.]

CLIFFORD V. CHURCH,

Notary Public.

Clerk's Office of the County Court of Tyler County, West Virginia.

The foregoing writing bearing date the 1st day of August, 1907, was presented in the Clerk's Office aforesaid, for and admitted to record upon and together with the certificate of acknowledgement thereto annexed, as to the persons named in said writing having signed and duly acknowledged the same, this the 21st day of September, 1907, at 2 o'clock P. M.

Attest:

J. W. DUTY, *Clerk.*

STATE OF WEST VIRGINIA,
*Clerk's Office of the County Court
of Tyler County, West Virginia, ss:*

I, J. W. Duty, Clerk of the County Court of Tyler County, in said State, do hereby certify that the foregoing is a true copy of a deed of trust or mortgage given by the Sistersville Brewing Company to Abijah Hays, trustee for W. H. Kirk, as the same is duly of record in the clerk's office aforesaid, as appears at page 135 to 138 Deed of Trust Book No. 13.

Given under my hand and the seal of said County Court, this the 28th day of January, 1911.

[COURT SEAL.]

J. W. DUTY, *Clerk.*

EXHIBIT "AC," WITH PLAINTIFF'S DEPOSITIONS.

Being Deed of Trust to Carl Benz, Trustee.

SISTERSVILLE BREWING COMPANY
to
CHARLES CLAUS, Trustee for Carl Benz.

Deed of Trust dated Sept. 24th, 1908. Real and Personal Property in the City of Sistersville to secure payment of note calling for \$4,400.00.

This Deed, made this 24th day of September, 1908, between the Sistersville Brewing Company, a corporation, created and existing under and by virtue of the laws of the State of West Virginia, having its principal office in the City of Sistersville, West Virginia, of the first part, and Charles Claus, trustee of Pittsburg, Pennsylvania, of the second part, and Carl Benz of Pittsburg, Pennsylvania, of the third part.

Whereas, at a meeting of the Board of Directors of said Sistersville Brewing Company, held on the twenty-third day of September, 1908, the following resolution was passed by said Board of Directors, to-wit: "Resolved, that this Company secure a loan of forty-four hundred dollars (\$4,400.00) for one year from Carl Benz, and that the president and secretary be hereby authorized to execute a note for forty-four hundred dollars (\$4,400.00) in favor of Carl Benz, and secure the payment of said note by deed of trust on the real estate, personal property, etc., of the Sistersville Brewing Company," and whereas, pursuant to the said resolution and the authority vested in them the said president and secretary have secured said loan of forty-four hundred dollars (\$4,400.00) from said Carl Benz, and have executed therefor the note of said Sistersville Brewing Company, payable to the order of said Carl Benz one year after date.

Now, therefore, this deed witnesseth: That for and in consideration of the premises, and the sum of five dollars (\$5.00) cash in

hand paid, the receipt whereof is hereby acknowledged and the matters hereinafter contained, the said Sistersville Brewing Company does hereby grant, bargain, sell and convey unto the said Charles Claus, trustee as aforesaid, with covenants of general warranty all that certain lot, tract or parcel of land, lying and being in the Fourth Ward of the City of Sistersville, County of Tyler and State of West Virginia, bounded and described as follows, to-wit: Beginning at a drill hole in the curbstone on the northward side of Carter street and the eastward side of the Baltimore and Ohio Railroad Company's right of way, and running thence S. 56 deg. 50 min. e. along the northward bound- of said Carter street, about one hundred and forty-six and nine-tenths (146.9) feet to a drill hole in the curbstone at the westward side of North Wells street; thence N. 27 deg. 55 min. e. along the westward bound- of said North Wells street, about two hundred and twenty-nine and two-tenths (229.2) feet to a drill hole in the curbstone, being a corner of land owned by Margaret Thoenen; thence N. 60 deg. 17 min. W. along the line of the land of the said Margaret Thoenen, about one hundred and forty-one and four-tenths (141.4) feet to a stake, being corner on the right of way of the Baltimore and Ohio Railroad Company aforesaid; thence S. 29 deg. 7 min. W. along the eastward bound- of said Baltimore and Ohio Railroad Company's right of way, about two hundred and twenty and two tenths (220.2) feet to the place of beginning, containing seven hundred and forty-one thousandths (.741) of an acre of land, more or less, and being the same property conveyed unto the said Sistersville Brewing Company by Virginia E. C. Roome and E. Roome, her husband, by deed bearing date the 25th day of July, 1905, and recorded in the office of the Clerk of the County Court of said Tyler County, West Virginia, in Deed Book No. 61, pages 28 and 29, together with the buildings and structures now located thereon, or which may — hereafter erected and built thereon; and in addition to the aforesaid real estate the said Sistersville Brewing Company does hereby grant, bargain, sell, assign and transfer unto the said Charles Claus, trustee as aforesaid, all machinery, both fixed and movable, fixtures, appliances, implements, and appurtenances of every description, which are now owned or may be hereafter acquired by said Brewing Company and used or provided for in the operation of its plant or carrying on its business, including engines, boilers, ice and refrigerating machines or plants, tanks, casks, and cooperage, brewing kettles and utensils, bottling house machinery of every description, and all wagons and horses owned by said company and used in carrying on its business. To have and to hold unto the said trustee, or his successors, in trust to secure the said Carl Benz, party of the third part, the payment of a certain indebtedness of forty-four hundred dollars (\$4,400.00) that being the amount of the loan advanced by said Carl Benz to the said Sistersville Brewing Company, as hereinbefore mentioned, with interest thereon from the twenty-fourth day of September, 1908, at the rate of six per centum per annum, which

said indebtedness is evidenced by a promissory, negotiable note bearing date the twenty-fourth day of September, 1908, executed in behalf of said Sistersville Brewing Company by its president and attested by its secretary, duly authorized as hereinbefore set forth, payable one year after date to the order of Carl Benz, at Monongahela Bank of Pittsburg, Pennsylvania, with interest.

Now, if the said Sistersville Brewing Company shall make default in the payment of said indebtedness, or interest thereon, in accordance with the terms and tenor of the promissory, negotiable note given in evidence of said indebtedness, or, in the event said indebtedness, or any part thereof, shall be continued beyond the period of one year as specified in aforesaid note, by agreement of said party of the first part and the said party of the third part, if the said Sistersville Brewing Company shall make default in the payment of any renewal or renewals thereof, or for any part thereof, and the interest thereon, in accordance with the terms and tenor of any note or notes given in evidence of said indebtedness, or any part thereof, then upon the request of the said Carl Benz or the legal holder of said note, or any note or notes given in renewal thereof, or for any part thereof, it shall be the duty of said trustee, or his successor, to enter upon and take possession of, and advertise and sell at public auction at or upon the premises herein described, the property hereby granted and assigned for cash, and out of the proceeds of such sale the trustee shall first pay the necessary costs and expenses attending the execution of this trust, second, the trustee shall pay unto the said Carl Benz, or his lawful assignee the full amount of said loan or indebtedness, together with all interest accrued thereon, and all moneys, together with interest thereon from the date of payment, which the said Carl Benz, or his lawful assignee, may have paid for taxes, assessments, insurance, fees, or other expense necessarily incurred in protecting said property during the continuance of said loan, after deducting therefrom any proper credits which may have been paid thereon. The balance, if any, the trustee shall pay to the party legally entitled thereto.

It is stipulated that the said Sistersville Brewing Company shall keep the herein granted property insured for the benefit of the beneficiary under this trust in the sum of — dollars (\$—), and shall regularly pay all taxes thereon, and all assessments, legally made against said property; upon the failure so to do, the beneficiary hereunder may cause the property to be insured in
250 an amount not to exceed the above named sum, and may pay said taxes and assessments; and the amount so paid shall bear interest from the time of payment, and be deemed a part of the indebtedness secured by this deed of trust.

It is further stipulated that in executing this trust in accordance with the provisions herein contained, it shall not be necessary for the trustee, in the event of a sale hereunder to be present except by attorney or agent. If it be deemed by the trustee to the interest of all parties any sale hereunder may be adjourned from time to time, and public outcry at the time and place appointed shall be

sufficient notice of the said adjournment without other notice or publication. And except as it is herein otherwise specifically provided, this deed of trust and the execution of the trust thereunder shall be governed by the present existing laws of the State of West Virginia relating to deeds of trust and sales thereunder.

In witness whereof, the said Sistersville Brewing Company has herewith caused its corporate seal to be affixed and these presents to be signed in its behalf by its president and its secretary duly authorized.

[CORPORATE SEAL.]

SISTERSVILLE BREWING COMPANY,
By J. J. RECTENWALD, *President*.

Attest

W. H. KIRK, *Secretary*.

STATE OF PENNSYLVANIA,

County of Allegheny, To wit:

I, Martin Kraus, a Notary Public of said County and State, do certify that J. J. Rechtenwald personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the president of the corporation described in the writing above, bearing date on the twenty fourth day of September, 1908, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, that the seal affixed to said writing is the corporate seal of said corporation, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said J. J. Rechtenwald acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 6th day of January, 1909.

[NOTARY SEAL.]

MARTIN KRAUS,
Notary Public.

My commission expires January, 21st, 1911.

251 STATE OF PENNSYLVANIA,

County of Allegheny, To wit:

I, O. C. Greenawalt, a Notary Public of said County of Allegheny, do certify that W. H. Kirk personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the secretary of the corporation described in the writing hereto annexed, bearing date the 24th day of September, 1908, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, that the seal affixed to said writing is the corporate seal of said corporation; and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said W. H. Kirk acknowledged the said writing to be the act and deed of the said corporation.

Given under my hand and official seal this 6th day of January, 1909.

[NOTARY'S SEAL.]

O. C. GREENAWALT,

Notary Public.

My appointment dated January 13th, 1903.

My Commission expires end next session senate.

CLERK'S OFFICE OF THE COUNTY COURT
OF TYLER COUNTY, WEST VIRGINIA, ss:

The foregoing writing bearing date the 24th day of Sept., 1908, was presented by Charles Claus in the Clerk's Office aforesaid, for and admitted to record upon and together with the certificate of acknowledgment thereto annexed, as to the persons named in said writing having signed and duly acknowledged the same, this the 29th day of January, 1909, at one o'clock P. M.

Attest

J. W. DUTY, *Clerk.*

STATE OF WEST VIRGINIA,

Clerk's Office of the County Court of Tyler County, ss:

I, J. W. Duty, Clerk of the County Court of Tyler County, in said State, do hereby certify that the foregoing is a true copy of a deed of trust from the Sistersville Brewing Company to Charles Claus, trustee for Carl Benz, as the same is duly of record in the Clerk's Office aforesaid as appears at page 364 Deed of Trust Book No. 13.

Given under my hand and the seal of said County Court, this the 28th day of January, 1911.

[COURT SEAL.]

J. W. DUTY, *Clerk.*

252 & 253

EXHIBIT "AD" WITH PLAINTIFF'S DEPOSITIONS,
Being an Abstract of Judgment of J. H. McCoy.
Judgment Lien Docket, Tyler County.

Names of the parties.	Amount of the judgment.	Date of the judgment.	Courts in which, or justice by whom, it was rendered.	Date of docketing it.
J. Hanford McCoy vs. Sisterville Brewing Co.	\$262.50. Two hundred and sixty-two dollars and 50-100 with interest from date. (Costs \$3.40 Paid by J. H. McCoy.)	Dec. 23d, 1907	G. L. Lowther, Justice of the Peace of Tyler Co., W. Va.	January 4th, 1908, 6:00 P.M.
			Execution issued and on Dec. 23rd, 1907, Dec. 28th, 1907. No property found.	

A true copy taken from page 111 of Judgment Lien
Docket No. 2, Tyler County, West Virginia.
J. W. DUTY, Clerk.

Attest:
J. W. DUTY, Clerk.

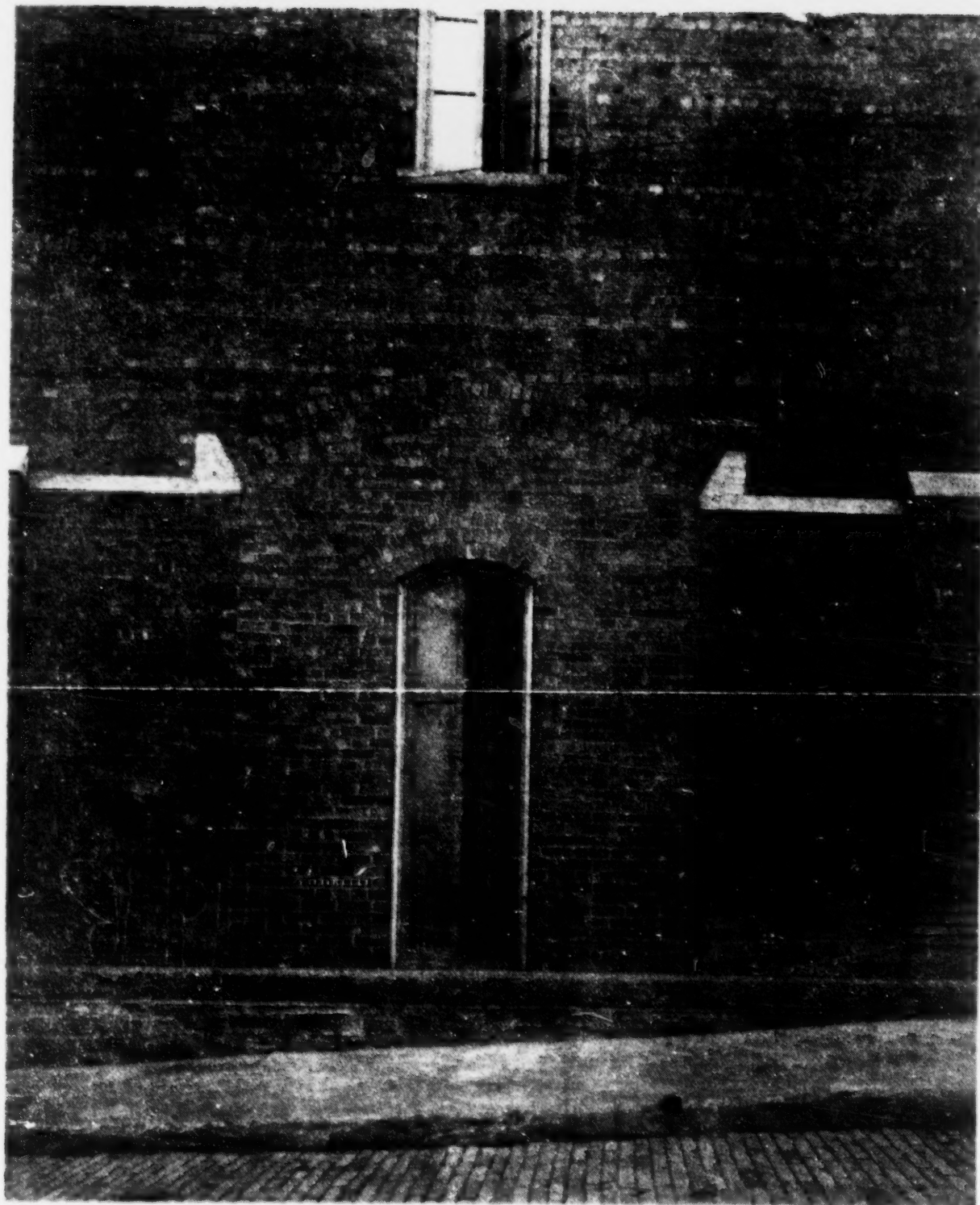


EXHIBIT "CHK. No. 1," WITH PLAINTIFF'S
DEPOSITIONS



EXHIBIT "CHK No. 2," WITH PLAINTIFF'S
DEPOSITIONS,

Being Another View of the Brewery

EXHIBIT "AE" WITH PLAINTIFF'S DEPOSITIONS,
Being an Abstract of Judgment of Feuchtwanger Bros.
Judgment Lien Docket, Tyler County.

Names of the parties.	Amount of the judgment	Date of the judgment.	Courts in which, or justice by whom, it was rendered.	Date of docketing it.
Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, parties doing business as Feuchtwanger Brothers, vs. Sistersville Brewing Co., a corporation, defendant.	\$3,490.72 and costs \$15.10 Three thousand four hundred and ninety and 72-100 Dollars with interest from 16th day of October, 1908, and \$15.10 costs.	1909. February Term.	Tyler County Circuit Court, W. Va.	1909. March 9th, 9:00 A. M.

Attest:
J. W. DUTY, Clerk.

A true copy taken from page 131 of Judgment Lien Docket No. 2, Tyler County, West Virginia.
J. W. DUTY, Clerk.

(Here follows photos marked pp. 255 & 256.)

In Equity. No. 162.

DETROIT STEEL COOPERAGE COMPANY
v.
SISTERSVILLE BREWING COMPANY et al.

This cause came on this 17th day of October, 1911, to be heard upon the subpoena duly served on the defendants George W. Hartman, Bollinger Brothers, Sistersville Brewing Company, Gale Justus, R. H. Skaggs, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County of Tyler, City of Sistersville, William E. Cummins, as collector and treasurer of said City of Sistersville, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company, Abijah Hays as trustee, Charles Claus, as trustee, and County Court of Tyler County; upon the order entered on the 14th day of April, 1910, duly served as therein directed on the defendants John S. Sell, as trustee, W. H. Kirk, Carl Benz, F. Hogenmiller, Henry Feuchtwanger, Aaron Feuchtwanger and Joseph Feuchtwanger and also on J. Hanford McCoy, as receiver as aforesaid, and Ohio Valley Brewing Company; upon the bill and exhibits therewith upon the joint answer of said George W. Hartman and Bollinger Brothers, and the plaintiff's general replication to said answer; upon the bill taken for confessed as to and against all of the defendants, except said George W. Hartman and Bollinger Brothers; upon the depositions duly taken, and exhibits therewith filed, by the plaintiff and by said George W. Hartman and Bollinger Brothers; upon all papers formerly read and all orders and decrees formerly made and entered in this cause; and upon the argument of counsel. On consideration whereof, the court is of the opinion that the plaintiff is not entitled to the relief prayed by it. It is therefore adjudged, ordered and decreed that the plaintiff's bill be and the same is hereby dismissed out of court, for want of equity, and that the plaintiff do pay the costs of this suit, for which costs execution may be issued.

258

Petition for Appeal.

Filed Oct. 27th, 1911.

In the Circuit Court of the United States for the Northern District
of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY, a Corporation,
vs.
SISTERSVILLE BREWING COMPANY, a Corporation, et al.

To the Honorable the Judges of the Circuit Court of the United States
for the Northern District of West Virginia:

Detroit Steel Cooperage Company, the plaintiff in the above entitled cause, conceiving itself aggrieved by the decree made and entered in said cause on the 17th day of October, 1911, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Fourth Circuit, and does file herewith its assignment of errors; and it prays that this, its appeal, may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit.

DETROIT STEEL COOPERAGE
COMPANY,
By COUNSEL.

WALTER S. SUGDEN,
CHAS. N. KIMBALL,
GEO. M. HOFFHEIMER,
Counsel for Plaintiff.

259

Assignments of Error.

Filed Oct. 27th, 1911.

In the Circuit Court of the United States for the Northern District
of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY, a Corporation,
vs.
SISTERSVILLE BREWING COMPANY, a Corporation, et al.

Comes now the plaintiff, Detroit Steel Cooperage Company, a corporation, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

1. The Circuit Court of the United States for the Northern Dis-

trict of West Virginia erred in making and entering the decree in favor of the defendants and against the plaintiff, made and entered on the 17th day of October, 1911.

2. Said Circuit Court erred in refusing the relief prayed by the plaintiff's bill, and in dismissing said bill.

3. Said Circuit Court erred in not holding that under the contract set forth in the record, title to and ownership of the tanks and fixtures in controversy, remained in the plaintiff, the contract price not having been paid.

4. Said Circuit Court erred in not holding that, under the contract set forth in the record, title to and ownership of the tanks and fixtures in controversy, remained in said plaintiff, until the contract price therefor was paid, and that, said contract price not having been paid and default having been made in the payment therefor, said plaintiff had and has the right to take possession of and remove said tanks and fixtures, subject to the payment by the plaintiff of the cost of reopening, for said removal, and of closing, after said removal, the archway constructed in the brewery for the entrance of said tanks and fixtures.

5. Said Circuit Court erred in holding that the reservation to the plaintiff, in the contract set forth in the record, of title to
260 and ownership of the tanks and fixtures in controversy, until the payment of the contract price, and of the right, in case of default in such payment, to take possession of and remove the same, was void as against the mortgages or deeds of trust executed by, and the judgments recovered and executions issued against, said Brewing Company.

6. Said Circuit Court erred in holding that the mortgages or deeds of trust executed by, and the judgments recovered and executions issued against, Sistersville Brewing Company, were liens on the tanks and fixtures in controversy, having priority over the title to, ownership of, and right to take possession of and remove said tanks and fixtures, reserved to said plaintiff in the contract set forth in the record.

7. Said Circuit Court erred in holding that the provisions of the mortgages or deeds of trust executed by Sistersville Brewing Company to John S. Sell, trustee, and Abijah Hays, trustee, respectively, purporting to convey or create a lien on after acquired property, were effectual to convey or create a lien on the tanks and fixtures, furnished and installed in the brewery by the plaintiff, after the execution of said mortgages or deeds of trust, as against the title to, ownership of, and right to take possession of and remove the same, reserved to said plaintiff in the contract set forth in the record.

8. Said Circuit Court erred in holding that the tanks and fixtures in controversy, upon installation in the brewery, became a part of the real estate.

9. Said Circuit Court erred in holding that the tanks and fixtures in controversy were so annexed to the real estate as to become subject to the liens of the mortgages or deeds of trust executed by, and judgments recovered and executions issued against, Sistersville Brewing Company, notwithstanding the reservation to the plaintiff of the

title to, ownership of, and right to take possession of and remove said tanks and fixtures, in the contract set forth in the record.

10. Said Circuit Court erred in holding that the tanks and fixtures in controversy, were essential to the integrity and operation of said brewery, and, therefore, subject to the liens of the mortgages or deeds of trust executed by, and judgments recovered and executions issued against, Sistersville Brewing Company, notwithstanding the reservation to the plaintiff of the title to, ownership of, and right to take possession of and remove said tanks and fixtures, in the contract set forth in the record.

261 11. Said Circuit Court erred in not holding that the mortgages or deeds of trust executed by, and judgments recovered against, Sistersville Brewing Company prior to the installation of the tanks and fixtures in controversy, could not become liens on said tanks and fixtures, except subject to the title to ownership of, and right to take possession of and remove the same, reserved by the plaintiff in its contract with said Brewing Company, the plaintiff to pay the cost of reopening, for said removal, and of closing, after said removal, the archway constructed in the brewery for the entrance of said tanks and fixtures.

12. Said Circuit Court erred in holding that it had jurisdiction of the suit of George W. Hartman et al. against Sistersville Brewing Company et al.

13. Said Circuit Court erred in not holding that the proceedings, orders and decrees in the suit of George W. Hartman et al. against Sistersville Brewing Company et al. were without jurisdiction and void, as to and against Detroit Steel Cooperage Company.

14. Said Circuit Court erred in holding that it had jurisdiction of the suit of George W. Hartman et al. against Sistersville Brewing Company et al., although John S. Sell, trustee, to whom was executed the mortgage or deed of trust sought to be foreclosed in said suit was not joined as a party, and said John S. Sell, trustee, and the plaintiffs in said suit, were, at the time of the commencement thereof, residents and citizens of the State of Pennsylvania.

15. Said Circuit Court erred in holding that Detroit Steel Cooperage Company, which was not joined as a party to the suit of George W. Hartman et al. against Sistersville Brewing Company et al., was not an indispensable party to said suit.

16. Said Circuit Court erred in holding that it had jurisdiction in the suit of George W. Hartman et al. against Sistersville Brewing Company et al., to decree a sale of the tanks and fixtures in controversy, title to and ownership of said tanks and fixtures, until the payment of the contract price, and the right, in case of default in such payment, to take possession of and remove said fixtures, having been reserved to said Detroit Steel Cooperage Company in the contract set forth in the record.

262 17. Said Circuit Court erred in not awarding an injunction, enjoining and restraining the receiver appointed in the suit of George W. Hartman et al. against Sistersville Brewing Company et al. from selling the tanks and fixtures in controversy, title to and ownership of which tanks and fixtures, until

the payment of the contract price, and the right, in case of default in such payment, to take possession of and remove said tanks and fixtures, having been reserved by Detroit Steel Cooperage Company in and by the contract set forth in the record.

18. If the sale of the tanks and fixtures in controversy, by the receiver appointed in the suit of George W. Hartman et al. against Sistersville Brewing Company et al., pending the suit of Detroit Steel Cooperage Company against Sistersville Brewing Company et al., was valid, then the Circuit Court erred in not decreeing that said Detroit Steel Cooperage Company, be paid out of the proceeds of said sale, the amount of the notes held by said Detroit Steel Cooperage Company for the unpaid contract price of said tanks and fixtures.

Wherefore, the said plaintiff prays that the decree of the said Circuit Court may be reversed, and that a decree be entered or directed to be entered in favor of the plaintiff.

DETROIT STEEL COOPERAGE COMPANY,

By COUNSEL.

GEO. M. HOFFHEIMER,

Counsel for Plaintiff.

Appeal Bond.

Filed Oct. 27th, 1911.

Know all men by these presents, that we, Detroit Steel Cooperage Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, as principal, and The United States Fidelity and Guaranty Co. of Baltimore, Md., as surety, are held and firmly bound unto Sistersville Brewing Company, a corporation, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the county of Tyler, in the State of West Virginia, City of Sistersville, a municipal corporation, William E. Cummins, as collector and treasurer of the said City of Sistersville, John S. Sell, as trustee, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company, Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, George W. Hartman, Bollinger Brothers, a corporation, and the County Court of Tyler County, West Virginia, a corporation, in the full and just sum of five hundred (500) dollars to be paid to the said Sistersville Brewing Company, a corporation, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County of Tyler, in the State of West Virginia, City of Sistersville, a municipal corporation, William E. Cummins, as collector and treasurer of the said City of Sistersville, John S. Sell, as trustee, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company,

Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, George W. Hartman, Bollinger Brothers, a corporation and the County Court of Tyler County, West Virginia, a corporation, their certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of October, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a term of the Circuit Court of the United States for the Northern District of West Virginia, in a suit depending in said court, between said Detroit Steel Cooperage Company, complainant, and Sistersville Brewing Company, a corporation, Gale Justus, R. H. Skaggs, F. Hogenmiller, G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the county of Tyler, in the State of West Virginia, City of Sistersville, a municipal corporation, William E. Cummins as collector and treasurer of the said City of Sistersville, John S. Sell, as trustee, J. Hanford McCoy, in his own right and as receiver of said Sistersville Brewing Company, Abijah Hays, as trustee, W. H. Kirk, Charles Claus, as trustee, Carl Benz, Henry Feuchtwanger, Joseph Feuchtwanger, Aaron Feuchtwanger, George W. Hartman, Bollinger Brothers, a corporation, and the County Court of Tyler County, West Virginia, a corporation, defendants, a decree was rendered against the said Detroit Steel Cooperage Company, and the said Detroit Steel Cooperage Company having obtained an appeal to reverse the decree in the aforesaid suit,

Now, the condition of the above obligation is such, that if the said Detroit Steel Cooperage Company shall prosecute its appeal to effect, and answer all damages and costs if it, the said Detroit

Steel Cooperage Company, fail to make its plea good, then
 264 the above obligation to be void, else to remain in full force and virtue.

[SEAL.] DETROIT STEEL COOPERAGE CO.,
 By HENRY C. WIEDEMAN, *Its President.*

Attest:

OTTO REINVALDT, *Secretary.*

THE UNITED STATES FIDELITY AND
 GUARANTY CO. OF BALTIMORE, MD.

By A. S. LOVE, *Att'y-in-Fact.*

[SEAL.]

Attest:

— — —, *Secretary.*

Sealed and delivered by said Detroit Steel Cooperage Company in presence of:

E. H. CHAMBERLIN.

W. J. FRITZ.

Sealed and delivered by said United States Fidelity & Guaranty Co. of Baltimore, Maryland & acknowledged in the presence of:

L. V. G. MORRIS,
Deputy Clerk.

Approved by:

ALSTON G. DAYTON,
*United States District Judge,
Northern District of West Virginia.*

Order Allowing Appeal.

Entered Oct. 27th, 1911.

In Equity.

DETROIT STEEL COOPERAGE COMPANY
v.
SISTERSVILLE BREWING COMPANY et al.

This day came the plaintiff, Detroit Steel Cooperage Company, and filed its petition, praying an appeal to the United States Circuit Court of Appeals for the Fourth Circuit, from the decree
265 made and entered in this cause on one of the former days of the present term of this court, to-wit: on the 17th day of October, 1911, and with its petition filed its assignments of error, on consideration whereof it is ordered that the prayer of said petition for an appeal be and the same is hereby granted, and that the appeal therein prayed be and the same is hereby allowed, bond to be given by the plaintiff in the penal sum of five hundred dollars, with condition that said plaintiff shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good. And thereupon the said plaintiff in open court presented its bond, in the penal sum and conditioned as aforesaid, with The United States Fidelity and Guaranty Co. of Baltimore, Md., as surety, and said bond is now here approved by the court and filed.

Order of Nov. 20, 1911, Enlarging Time for Completing Transcript of the Record.

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

DETROIT STEEL COOPERAGE COMPANY
vs.
SISTERSVILLE BREWING COMPANY and Others.

On this 20th day of November, 1911, it appearing to the court from the statement of the clerk that there is not sufficient time in

which to complete the transcript of the record upon the appeal in the above entitled cause to the United States Circuit Court of Appeals for the Fourth Circuit, by the 26th day of November, 1911, it is therefore ordered that the time for completing such transcript be enlarged until December 27th, 1911.

Enter: Nov'r 20, 1911.

ALSTON G. DAYTON, *Judge*.

And, thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Teste:

S. R. HARRISON, *Clerk*.

265 *Clerk's Certificate.*

UNITED STATES OF AMERICA,

Northern District of West Virginia, ss:

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia, do hereby certify that the foregoing is a full and true record of the proceedings in said court in the cause in equity therein pending in which Detroit Steel Cooperage Company is plaintiff and Sistersville Brewing Company and others are defendants, as now appears of record in my office at Wheeling, in said District.

In testimony whereof I have hereto set my hand and the seal of said court, at Wheeling, in said district, this 2nd day of December, A. D. 1911.

[SEAL OF COURT.]

S. R. HARRISON,
Clerk as Aforesaid.

267 & 268 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,

vs.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H. SKAGGS, F. HOGENMILLER, et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

December 9, 1911, transcript of the record is filed, and cause docketed.

Same day, appearance of Charles N. Kimball, Walter S. Sugden and George M. Hoffheimer is entered for the appellant, orders filed.

December 28, 1911, appearance of Thomas P. Jacobs and Arlen G. Swiger is entered for the appellees, order filed.

January 9, 1912, twenty copies of the printed record are filed.

March 5, 1912 (February Term, 1912), cause came on to be heard before Pritchard, Circuit Judge, and Boyd and Rose, District Judges, and is argued by counsel, and submitted.

April 9, 1912 (February Term, 1912), the court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed April 9, 1912.

269 United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant.

versus

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H. SKAGGS, F. HOGENMILLER, et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

[Argued March 5, 1912; Decided April 9, 1912.]

Before Pritchard, Circuit Judge; Boyd and Rose, District Judges.

Charles N. Kimball and George M. Hoffheimer (Orla B. Taylor and Walter S. Sugden on briefs) for appellant, and Thomas P. Jacobs (Arlen G. Swiger on brief) for appellee.

Statement.

This is a bill in equity filed by the Detroit Steel Cooperage Company against the Sistersville Brewing Company and others in the Circuit Court of the United States for the Northern District
270 of West Virginia, in which the complainant seeks to be declared the owner and entitled to take possession of thirteen chip tanks located in the brewery of the Sistersville Brewing Company, at Sistersville, West Virginia, or to be decreed to have a preference in the distribution of the assets of the said Brewing Company for \$4,531.15 with interest, the unpaid purchase money for the said tanks. Upon the bill, exhibits, answer and replication the case was heard on the 17th day of October, 1911, and a decree entered by the Circuit Court dismissing the bill for want of equity and adjudging costs in favor of the defendants. From this decree the complainant appealed to this court. The facts are in substance as follows:

The Sistersville Brewing Company, one of the appellees, was organized in 1904 under an act of incorporation passed by the Legis-

lature of West Virginia. The business of the company was the manufacture and sale of porter, ale and lager beer, and the principal office and manufacturing plant of the company were located at Sistersville, West Virginia. The company owned a small parcel of land on which was erected the building used as its manufacturing plant, and in which building were the fixtures, machinery and appliances necessary to the purposes of the establishment. In December, 1906, the company, under a provision of its charter, set about to make an issue of bonds, eighty in number, of the par value of five hundred dollars each (making an aggregate of \$40,000.00), and to secure the payment of these bonds with interest as it accrued, what is called a deed of trust in the nature of a mortgage was executed by the company to one Sells as Trustee, in which deed the company conveyed the tract or parcel of land mentioned before with the brewery and buildings, machinery and appliances thereon erected, or to be erected thereon, with appurtenances thereto belonging, or in any way appertaining, as well as the corporate rights and privileges of said company for use, benefit and security as contemplated by the deed. This deed was duly recorded in Tyler County, West Virginia, being the county in which the land and brewery thereon were located, on the 21st day of February, 1907. The funds

271 derived from the sale of the bonds were used in the construction and equipment of the brewery plant. The bonds provided for, and for the payment of which the deed of trust above referred to was security, were all issued and were outstanding at the time of the transaction hereinafter set out between the Detroit Steel Cooperage Company and the Brewery Company.

On the 8th of August, 1908, a contract was entered into between the Brewery Company and the Detroit Steel Cooperage Company whereby the latter named company agreed to furnish to the former and place in the brewery thirteen chip casks or tanks, the terms of the contract (after giving specifications as to number, description, manner of construction, character of workmanship, fittings and fixtures with each tank, period within which delivery was to be made, etc.) were these:

"Conditions.

"It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified and any notes and acceptances that may be given on account of any such payments, shall have been fully paid; and in case of default in any of said payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures.

"Delivery.

"We agree to furnish all of the 13 tanks, together with all fixtures and fittings as herein specified, F. O. B. cars at Sistersville, W. Va., on or before the — day of — 190—, provided we are not

delayed by accidents, strikes, riots, delays of carriers or other causes beyond our control.

"Erection.

"We will furnish the necessary labor and tools to erect in your brewery all of the herein specified tanks and connect the fittings and fixtures thereto in a first class and complete manner; also to test all of the tanks and make them perfectly tight under such pressure as before specified, but you are to furnish the necessary water or air for testing said tanks whenever it may be needed by our erecting Engineer.

272

"Openings.

"You are to provide all necessary openings in walls and buildings, to readily admit the tanks, finished and completed at our factory, so that they may be installed in their respective places and positions without being taken apart.

"Price.

"The price of all the 13 tanks, together with the fittings and fixtures thereto, delivered and erected as hereinbefore specified, is the sum of five thousand four hundred eighty dollars, \$5,480.00.

"Terms.

"The payments of the above purchase price to be made as follows: \$2,000.00 when all of the tanks have been shipped. \$740.00 when erected at Brewery and tested. \$2,740.00 in the form of a promissory note, payable in three months from date with 6% interest per annum."

The tanks were made of steel, lined with glass enamel, were about eight feet in diameter, twelve feet ten inches high, and had a holding capacity of about 4,000 gallons each. Their gravity was sufficient to hold them in place without fastenings.

In accordance with the terms of this agreement the Cooperage Company furnished the tanks, which were necessary for the purposes of the brewery, shipped them to Sistersville and they were put in place in the brewery, and attached to and became a part of the operating machinery of the same. The cash payments were made, and notes given for the balance as set out in the contract. This contract was duly registered in Tyler County as required under the statute laws of West Virginia in January, 1909. After the tanks were delivered and put in place, as stated, in the brewery, George W. Hartman, Bollinger Brothers and others, in April, 1909, filed a bill in the Circuit Court of the United States for the Northern District of West Virginia against the Sistersville Brewing Company and others alleging that complainants were the holders of a majority of the bonds issued by the said company; that default had been

made in payment, and other acts had been committed by the
 273 company which warranted the proceeding to foreclose the
 deed of trust which had been executed as security for the
 payment of the bonds. In this case a decree was made appointing a
 receiver, and the property of the Brewing Company, including the
 tanks which were therein as a part of the equipment and machinery
 was sold, and the proceeds are now in the hands of the receiver.

BOYD, *District Judge*:

There are two questions presented by the record which become
 necessary for us to determine. The first is whether the tanks referred
 to are fixtures, and the second, if they are held to be fixtures
 does the reservation of title in the contract between the Cooperage
 Company and the Brewing Company as security for the purchase
 money entitle the vendor to retake the tanks or to have a preference
 over the lien of the bondholders for the unpaid balance of the purchase
 price in the distribution of the proceeds of the sale of the
 brewery.

Considering the first question, we are readily of the opinion that
 the tanks were fixtures. They were adapted to the purposes of the
 freehold, were essential to the successful operation of the brewery
 and were placed within the structure with the intention of making
 them a part of the operating machinery of the plant. The physical
 annexation of the tanks to the plant was complete, for they were
 put in place in the brewery and attached to the other machinery
 used in the production of malt liquors. They were carried to the
 proper position in the building through an opening in the wall,
 which had been left for that purpose, and which opening was closed
 up with brick and mortar, and it appears that in order to remove
 them from the building it would be necessary to tear this filling
 away. As will be seen, the tanks were made of steel, lined with
 glass enamel, were about eight feet in diameter, twelve feet ten
 inches high, and had a holding capacity of about 4,000 gallons
 each. Their gravity was sufficient to hold them in place without
 fastenings.

We think that by the well settled principles of the law of fixtures
 in this country these tanks became, and were a part of the
 274 realty. Undoubtedly under the law of the State of West
 Virginia as laid down by the Court of Appeals of that State
 in *Patton v. Moore*, 16 W. Va., 428, the tanks were fixtures, for the
 court says in that case:

"The true rule in determining what are fixtures in a manufac-
 turing establishment, where the land and buildings are owned by
 the manufacturer, is, that where the machinery is permanent in its
 character, and essential to the purposes for which the building is
 occupied, it must be regarded as realty and passes with the build-
 ing; and whatever is essential to the purpose for which the building
 is used will be considered as a fixture, although the connection be-
 tween them be such that it may be severed without physical or lasting
 injury to either."

However, we will not discuss this proposition further, nor do we deem it necessary to cite authorities in support of our view because it seems to us too clear for argument. This question disposed of, we come to the second.

The deed of trust for the security of the bonds not only covered the real estate as it existed at the time of the execution of the deed, but provided, as will be seen from the statement of facts, that after-acquired property was also subject to the lien. The Cooperage Company entered into the transaction with the Brewing Company for the sale to the latter of the chip tanks, as we gather from the record, with both actual and constructive notice of the existence of the deed of trust, and with this knowledge furnished the tanks and permitted them to become a part of the freehold. The money derived from the sale of the bonds was used, as appears, in the construction and equipment of the brewery. The principle involved here is discussed at length in the case of *Tippett & Wood v. Barham*, decided by this court, and to be found in 180 Fed., 76. The court said in that case:

"There is a line of cases which, with more or less unanimity, holds that where a mortgage exists on real estate, and an accession is subsequently made of property agreed between vendor and the mortgagor to be treated as personalty and a reservation of title until paid for agreed upon between vendor and mortgagor-purchaser, such accession, if it can be severed from the realty without
275 & 276 injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, will be impressed with the same character as between the vendor and mortgagee as between the vendor and mortgagor; in other words, that it does not become real estate, and may be removed without invading the rights of the mortgagee."

"Upon the other hand, there are many cases, (some of which will hereinafter be referred to) which hold that personal property incorporated into or affixed to real estate in such manner that it would be subject to the lien of an existing mortgage thereon as between the mortgagor and mortgagee will be so subject to the lien of the mortgage, notwithstanding the existence of an agreement between the vendor and the mortgagor that it shall retain its character as personal property, unless the mortgagee be also a party to such agreement. This is what is generally known as the Massachusetts rule, and it has been affirmed by many other courts of last resort, and particularly by the Supreme Court of the United States in several cases hereinafter separately referred to.

"We think this latter doctrine announces the correct principle, especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after-acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and

received in contemplation of such accessions. In such cases the equities of the beneficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or a legal title intervenes."

In view of our conclusion upon the first question we think this case decisive of the second, and the decree of the Circuit Court is, therefore, affirmed.

Affirmed.

277 & 278 April 10, 1912 (Same Term), the court made and entered the following decree, to-wit:

Decree.

Filed and Entered April 10, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant.

vs.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H. SKAGGS, F. HOGENMILLER, et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby affirmed, with costs.

NATHAN GOFF.

April 10th, 1912.

Petition of Appellant for a Rehearing.

Presented May 2, 1912.

279 United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,
versus
SISTERSVILLE BREWING COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern
District of West Virginia, at Wheeling.

Petition for Rehearing.

To the Honorable the Judges of the United States Circuit Court of
Appeals for the Fourth Circuit:

Your petitioner, Detroit Steel Cooperage Company, appellant in the above entitled cause, respectfully represents that it is aggrieved by the judgment of this Court entered on the 9th day of April, 1912, affirming the decree of the Circuit Court of the United States for the Northern District of West Virginia, and it respectfully applies for a rehearing of said cause.

280 The erroneous result, founded, as your petitioner conceives, in misapprehension of the facts and misapplication of legal principles, would be passed over in silence did this decision do no more than deny to the petitioner property in the tanks involved or compensation therefor: for the petitioner recognizes that the appearance of importunity against an adverse decision is an ungrateful thing.

But the judgment which this court has pronounced goes further than a mere adjudication of the title to thirteen tanks in a brewery at Sistersville, West Virginia; it is utterly subversive of the petitioner's security for large credits extended in many and diverse parts of the United States. Nor is this all. If the conclusion arrived at in this case be true, an entire agency of the credit system of the country is at once struck down; for nothing is more universal in this day than the sale of boilers, dynamos, generators, machinery and manufacturers' equipment of all kinds, with title reserved to the vendor pending payment of the price. The amount of such credits existing at all times aggregates millions of dollars; and to the security for every dollar of such credits the reasoning of this court is as applicable and destructive as in the case at bar. More than this,—if the reasoning adopted in the present case be sound, it is equally apposite in the case of a chattel mortgage, and it goes still further: for, as will be pointed out hereinafter, it compels the logical conclusion that, even as between a vendor and vendee, a retention of title to machinery or manufacturing property is utterly without efficacy.

In the light of the foregoing considerations, the petitioner deems itself well justified in pointing out the vice which inheres in the opinion filed in this case.

The ultimate conclusion of the Court is that the after-acquired property clause of the first mortgage of the Sistersville Brewing Co. was and is superior in right to the reservation of title, under which delivery of the tanks was made to the mortgagor. And this conclusion is based on the preliminary opinion that the tanks became "fixtures" and a part of the realty. And this opinion in turn is founded on the view that the tanks were annexed to the brewery, appropriated to its use, and essential to its operation as a going plant. It is proposed to analyze briefly and in inverse order the propositions thus laid down.

II.

The summary of facts made in the opinion well illustrates an observation made not long since in the Senate by Senator Root, that by drawing a fact a little out of line, the entire aspect of a case may be changed. The opinion states the facts in the following terms:

"Considering the first question, we are readily of the opinion that the tanks were fixtures. They were adapted to the purpose of the freehold, were essential to the successful operation of the brewery and were placed within the structure with the intention of making them a part of the operating machinery of the plant. The physical annexation of the tanks to the plant was complete, for they were put in place in the brewery and attached to the other machinery used in the production of malt liquors. They were carried to the proper position in the building through an opening in the wall, which had been left for that purpose, and which opening was closed up with brick and mortar, and it appears that in order to remove them from the building it would be necessary to tear this filling away. As will be seen, the tanks were made of steel, lined with glass enamel, were about eight feet in diameter, twelve feet ten inches high, and had a holding capacity of about 4,000 gallons each. Their gravity was sufficient to hold them in place without fastenings."

For the purpose of comparison, and at the risk of prolixity it may be convenient to reproduce the following excerpt from the petitioner's original brief (pp. 19-23), the accuracy of which was not impugned by the appellees:

282 "When the brewery building was completed in April, 1906, according to the usual custom in building breweries (Rec. pp. 7, 73, 84, 89, 92, 114, 128, 140, 141, 142, 150), and in compliance with the plans for this very building (Rec. pp. 122, 140, 158), an archway was left in the wall for the purpose of accommodating the entrance and exit of the tanks. (Rec. pp. 83, 84, 87, 114, 122, 123, 140, 141, 150, 162, 170.) From the time of the completion of the building in April, 1906, until after the installation of these tanks in August, 1908, a period of more than two years, this arch stood open (Rec. pp. 83, 162, 163, 170), though during this period the danger

of the building's settling was greatest, and at the end of that period was practically terminated (Rec. pp. 126, 141, 163).

"After the installation of the tanks, the archway was filled up with a brick wall surrounding a window, in accordance with the architect's plans. (Rec. pp. 121, 141, 158, 163.) But the wall, with which the archway was partially filled up, supports nothing, and would have supported nothing, even if the window had been omitted. (Rec. pp. 90, 164, 165.) The imposed weight of the building is supported, not by the wall within the archway, but by the arch above the opening. (Rec. p. 164.) From the standpoint of supporting weight, the wall within the archway is so utterly lacking in consequence, that the archway might as well have been closed up with wooden doors. (Rec. p. 164.) The choice of brick for the purpose of filling up the archway was due merely to a desire to conform the material to the residue of the building, and to the superiority of brick as an insulator in the preservation of the interior temperature. (Rec. pp. 90, 115.)

"The external appearance of this archway, as closed up after the installation of the tanks, and as the same has existed since, is well displayed by the two photographs shown at pages 255 and 256 of the printed record, and by the plan therefor contained in page 158 thereof.

"As is shown by the foregoing photographs and plan, as well as by the evidence, the wall within this archway is not in any
283 manner interlocked with the surrounding wall (Rec. p. 163), and can be removed without the slightest injury or damage to the building. (Rec. pp. 85, 90, 92, 116, 141, 142, 164.) The work of removal of the wall could be accomplished by any one of ordinary intelligence, without especial skill in masonry. (Rec. pp. 90, 92, 165.) We shall demonstrate hereinafter, also, that in or by the removal of this wall, no element of the interior arrangements of the brewery would be injured or even interfered with (Rec. pp. 164, 167, 168, 173, 174); and that the expense of tearing down and then restoring the wall within the archway, which expense the appellant offered in its bill to assume, would be the merest trifle. (Rec. pp. 90, 91, 92, 142, 164-167, 173.)

"The chip casks or tanks in question were completely manufactured at the works of the appellant in Detroit, Michigan, and shipped to the brewery at Sistersville, ready for installation. Nothing remained to be done with the tanks, when they arrived, except to convey them into the brewery, set them up on the iron stands, later mentioned, attach the fittings and doors and test the tanks. (Rec. p. 84.)

"The tanks installed in the brewery are thirteen in number, but it was proved that only seven of them were ever used. (Rec. p. 171.)

"The tanks are merely circular steel receptacles, of a special type designed for breweries, lined with enamel, and constructed to resist pressure. They are eight feet in diameter, with a maximum height of ten and one-half feet. Tanks of this type have been employed in breweries since the year 1886, so far as is disclosed by the record.

They are manufactured not only by the appellant, but by the Fowler Company of Rochester. (Rec. pp. 72, 76, 80, 179.) There are other makes and types of chip tanks, and they are manufactured by about a dozen concerns other than the appellant. (Rec. pp. 80, 179.) A great many breweries still employ wooden chip tanks, and have refused to adopt the steel tanks. (Rec. pp. 80, 154, 179.)

284 "The function of chip casks or tanks in a brewery is to subject the beer to pressure,—“to give it life,” “to finish it,” as was said by some of the witnesses. (Rec. pp. 75, 148, 149.) While, in the event of the removal of the tanks furnished by the appellant, as a substitute therefor other tanks would be necessary, such substitution could be easily effected. As is evident from the statement above, other tanks could be obtained and placed in the brewery in their stead. (Rec. pp. 141, 147-159, 154, 179.) Or in lieu of the chip tanks a carbonating system could be installed, as is done in some breweries. (Rec. pp. 147, 148, 179, 183, 184.) The adoption of the carbonating system, would necessitate the elimination from the brewery of nothing except the chip casks. (Rec. p. 184.)

"The tanks furnished by the appellant can be removed from this brewery without injury to the tanks (Rec. pp. 71, 85, 154), and they can be used as well in any other brewery, which employs chip tanks. (Rec. pp. 71, 87, 142, 150.) The removal of steel chip casks of this type from one brewery, and their installation in another brewery is no novel thing. (Rec. pp. 72, 84, 85, 173.)

"The tanks are in no way attached to the land, the building or any other part of the brewery machinery, equipment or appliances. (Rec. 71, 82, 84, 95, 168, 169, 171.) They rest on cast iron stands, legs or supports (Rec. pp. 71, 75, 76, 84, 95, 170, 171), which permit the tank to be leveled (Rec. 81, 82), and are held in place by their own weight. (Rec. 84, 168.) The stands, legs or supports on which the tanks rest are not fastened to the floor, imbedded in the cement, or attached to the building, or any part thereof, by any connection or means whatsoever. (Rec. 71, 84, 95, 168, 169, 171.) The tanks are connected with none of the other apparatus or machinery in any respect. During their temporary periods of use, the beer is run into them, or withdrawn from them (Rec. 81, 172, 173, 176), through an ordinary one and one-half inch rubber hose (Rec. 76, 77, 81, 85, 95, 115, 119, 131, 149, 155, 156, 168, 172, 176,

178) which is attached by an ordinary coupling (Rec. 77, 285 81, 95, 152, 156, 168, 172, 174, 176), similar to that used to connect a garden hose with a hydrant. (Rec. 168, 171, 172.) The hose is coupled to the tank by hand without the aid of a wrench. (Rec. 172, 174, 176.) When the chip casks are not in use, the hose is disconnected and laid on the floor. (Rec. pp. 173, 174, 176.) The same hose can be and is used interchangeably on any of the tanks. (Rec. p. 179.)

"As we stated above, the removal of these tanks from the brewery would be attended with not the slightest injury or damage to the building. All that is necessary is to take out the wall, which fills the archway, remove the tanks and then restore the wall. This, it

was proved, is a simple task, and the appellees did not venture to adduce evidence to the contrary. (Rec. pp. 85, 90, 92, 116, 141, 142, 164, 195.) The archway, in fact, was designed by the architect for this very identical purpose. (Rec. pp. 72, 73, 84, 141, 142, 158.)

"The proof is clear, also, that the process of removing the tanks, would not in the slightest degree injure, disturb or interfere with any other element of the brewery. S. W. Bollinger, president of Bollinger Bros., testifying on his own behalf, endeavors to make it appear that the interior of the chip cask room is a perfect labyrinth of refrigerating and cooling pipes, attenuators and bunging system, that the archway wall is lined with cork insulation, cement and plaster, and that the opening of the archway and the removal of the chip casks would dismantle and ruin these pipes, attenuators and bunging system, and destroy the cork insulation, cement and plaster on the interior of the archway. In charity we refer to his testimony as merely negligent, though it was completely disproved by other witnesses. It was clearly shown by the evidence of Carl Boger, who superintended the construction of the brewery and was the brewmaster of this brewery so long as it was operated, and by the evidence of W. L. Fisk, who last inspected the brewery but a short time before

286 he testified, that there never was, nor is, any cork or other insulation, cement, plaster or other substance on the wall closing the archway; that the refrigerating and cooling pipes and bunging system are all located on the ceiling of the chip cask room; that there were and are no attenuators in the chip casks or the chip cask room, but the same were and are located in the fermenting room on the third floor of the building; and that none of these things, nor anything else, would be destroyed, dismantled or injured in or about the removal of the chip casks. (Rec. pp. 167-169, 171, 173-175.)

"The cost of opening up the arch and restoring it after the removal of the tanks, is shown to be trifling. Huettelman, a witness for appellant, testifies that it would be \$15. (Rec. pp. 90, 91.) Bloquelle, also called by the appellant, says \$15 to \$20. (Rec. p. 92.) Bollinger says \$80 to \$100 (Rec. p. 120), but in this estimate he allows \$30 to \$40 for cork insulation, which was never applied to this wall (Rec. pp. 164, 167, 169, 173), reducing his estimate to not over \$50. Keil, a witness for appellee, swears that it would be \$62.20 (Rec. p. 142), but allows \$35 in his estimate for cork insulation, and \$5.60 for plaster, neither of which was ever placed on this wall (Rec. pp. 164, 167, 169, 173), reducing his estimate to \$21.60. Burkhart, the contractor, who erected the building and walled up this arch, after the chip tanks were installed, estimated the cost at \$40.05, in which he includes a contractor's profit of \$10 (Rec. p. 165) and \$3 for new brick (Rec. p. 166). It is therefore apparent that in no view could the cost of tearing down and restoring to its present condition the wall under this arch, exceed \$40 or \$50, and this cost, or whatever expense might be incurred therefor, this appellant offered in its bill, and still offers, to pay.

"From the foregoing state of facts, therefore, it conclusively ap-

pears: (1) that the appellant and the Brewing Co., by the express terms of their contract, evinced a clear intention to preserve the status of the tanks as chattels, and to prevent their annexation to the realty; (2) that there was no physical annexation to the
287 realty; (3) that the separate identity of the tanks was preserved; and (4) that the tanks were not adapted peculiarly to the purposes of this particular brewery."

Returning now to the opinion, it is said therein that the tanks were adapted to the purposes of the freehold, but this is true only in the sense that the freehold was brewery property and the tanks were brewery apparatus. The record shows it to be untrue, that these tanks had any special adaptation to this brewery. They could as well have been installed in any other brewery; and similar tanks, originally built for this brewery, were in fact used in other plants.

It is laid down next that the tanks were essential to the successful operation of the brewery. This again is true in but a limited sense, and is untrue in the large sense in which it is stated. It was essential to the operation of this brewery that it, like any other, should possess some apparatus performing the function of these tanks. But these particular tanks were not requisite to the operation of the brewery; for others could have been installed. Other makes of steel enameled tanks were in the market. Wooden casks might have been employed, in accordance with the preference of some brewers and with the practice of brewers adhering to the tank system, prior to the introduction of steel tanks in the trade. And the employment of any tanks could have been obviated by the installation of a carbonating system.

The necessity for these tanks was a necessity arising not out of their peculiar character or relation to the brewery; but a necessity, if such it may be termed, arising out of the fact that the Brewing Company had been enabled under its contract with the petitioner to obtain possession thereof, and, if the contractual obligation were enforced, would be compelled to pay for the tanks, or to purchase and pay for a substitute. It may be conceded that a dire necessity is imposed on a debtor who is compelled to make unwilling payment
288 for property purchased. Lord Byron said that with sincerest regret he paid his creditors. But it cannot be that such reluctance creates a necessity which enables a purchaser, or those occupying no better position, to convert to their own use the property of others, or to transmute into real estate personal property, to which title has been expressly reserved.

It is next said that the tanks were placed within the structure with the intention of making them a part of the operating machinery of the plant. If an intention is to be accorded any virtue whatever, the petitioner is unable to perceive in what point an intention has been discovered of making these tanks a part of the operating machinery of the plant. The best evidence of the intention of the parties, the petitioner submits, was to be found in the contract entered into between the Brewing Company and the petitioner, and this was an intention, plainly manifested, not to make the tanks a part of the brewery. And this intention the petitioner, by its bill, asked to

have effectuated. The petitioner would find no fault, if the Court, in its disposal of this case, had accorded any weight to the actual intention, and had not arrived at a conclusion founded entirely upon the supposed physical relation of the tanks to the land and building, and from this supposed physical relation drawn an artificial, constructive intention which was never in the mind of anyone.

The next statement in the opinion is that the physical annexation of the tanks to the plant was complete. If any one fact was completely established, beyond controversy, it was that there was no physical annexation whatever. The tanks rested entirely upon cast iron legs, which were not fastened in any manner to the building. The tanks were connected by no other means with the brewery. The sole and only attachment of any sort arose during those temporary periods of use of the tanks, when a rubber hose was attached by a temporary coupling, for the purpose of running the beer into or out of the tanks. The employment of this rubber hose is the only basis for the statement that the tanks were "attached to the other machinery used in the production of malt liquors." And
289 even this fails in relation to six of the tanks which never were used by the Brewing Company, and hence could never have been converted into real estate by the medium of a rubber hose. If the situation and manner of employment of these tanks were such as to deprive them of their character of personal property, the petitioner utterly fails to perceive by what process it is ever possible to maintain any chattel sold as personal property, pending the payment of the purchase price, unless perhaps it should be suspended in nubibus like Mohammed's coffin or a contingent remainder at common law.

It is said again in the opinion that the tanks were carried to the proper position in the building through an opening in the wall which was closed up with brick and mortar, and that in order to remove them it would be necessary to tear this filling away. The record shows that this opening was left for the very purpose of admitting these tanks, that the removal of the wall within the opening would injure the building and contents in not the slightest degree, and that the restoration of the wall would entail an expense of not more than fifty dollars upon any reasonable estimate, which expense the petitioner offered to defray. If it be true that this trivial expense of fifty dollars, which in truth and fact would be no expense to the Brewing Company or its mortgagee, is sufficient to deprive the petitioner of property or payment for property of the value of more than five thousand dollars, then, by the same token, it must be true that the removal of property held under reservation of title could be prevented in any case, upon the theory that the opening of a door would cause some friction and consequent wear and tear on the hinges and lock.

It is said with substantial truth that the tanks were made of steel lined with glass enamel, were about eight feet in diameter twelve feet ten inches high and had a holding capacity of about four thousand gallons each, and that their gravity was sufficient to hold them in place without fastening. This observation might with equal force be made of an eight gallon keg, a table or a chair. The matter of

size and weight is, after all, one of comparison, bearing proportion to the mechanical means at hand for the purpose of removal. A compound locomotive could be moved easily by a traveling crane, though it might offer some difficulty to a man with a wheelbarrow, but it is not supposed that this would afford an obstacle to the application of the holding in *U. S. v. New Orleans Railroad Co.*, 12 Wall. 362, in case the locomotive were furnished under a car trust agreement.

III.

If the elements adverted to in the opinion as characterizing these tanks as fixtures and hence part of the realty are decisive, then it must be true that in no instance can a valid reservation of title be had in relation to ponderous machinery or appliances, or even less bulky property, in case a necessitous purchaser is unwilling or unable to pay for it. These elements, be it observed, are not elements vouched by the Court merely in aid of a mortgage, but are referred to in connection with an authority clearly distinguishable, as imposing on these tanks the status of real estate, by virtue of their physical relation and the necessities of the purchaser, regardless of any expression of intention contained in the contract of purchase, and regardless of the situation or even existence of any incumbrancer. The bulk of the chattel and the exigency of the purchaser are permitted to combine to deprive the vendor of his property, and the reasoning of the Court logically compels the conclusion that this deprivation may operate as well in favor of the necessitous purchaser as in favor of any third party occupying the position of prior incumbrancer.

All this at once appears from the case of *U. S. v. New Orleans Railroad Co.*, 12 Wall. 362, and the numerous cases following it, wherein it has been held: (1) that a pre-existing mortgagee, with after-acquired property clause in his mortgage, is a prior and not a subsequent purchaser or creditor; and (2) that such a mortgagee stands exactly upon the footing of the mortgagor, and subject to all of the conditions and liens which accompany the after-acquired property into the latter's possession.

- 291 *Fosdick v. Schall*, 99 U. S. 239.
Fosdick v. Car Co., 99 U. S. 256.
Myer v. Car Co., 102 U. S. 1.
Bear Lake Irr. Co. v. Garland, 164 U. S. 1, 16, 23.
Central Trust Co. v. Marietta & Co., 48 Fed. 865, 868.
Farmers' L. & T. Co. v. Denver & R. G. Co., 126 Fed. 49.
Tilford v. Atlantic Match Co., 134 Fed. 927.
Holly Mfg. Co. v. New Chester Water Co., 48 Fed. 879, 53 Fed. 19.
Harris v. Youngstown Bridge Co., 90 Fed. c28.
Cox v. New Bern Light & F. Co., 151 N. C. 648, 65 S. E. 648.
Williams v. New Jersey South. R. Co., 28 N. J. Eq. 277, 29 N. J. Eq. 311.
J. L. Mott Iron Works v. Middle States Const. Co., 17 App. Cas. (D. C.) 584.

Wood v. Holly Mfg. Co., 100 Ala. 326, 13 So. 948.

Haven v. Emery, 53 N. H. 66.

Defiance Mach. Works v. Trisler, 21 Mo. App. 69.

Davis v. Bliss, 187 N. Y. 77, 79 N. E. 851.

IV.

This interpretation of the opinion the petitioner thinks to be enforced by the reference to *Patton v. Moore*, 16 W. Va. 428. In *Patton v. Moore*, as was pointed out in the reply brief of this petitioner, the engine, boiler, burrs and mill irons in controversy were purchased by the owner of the land for use in the mill thereon. There was no reservation of title. No contract with any other person evinced an intention to preserve them as personalty. In the absence of any such evidence of intention, the common ownership of both land and engine, boilers, burrs and mill irons marked the latter as part of the realty, since the common owner would have no motive, and had evinced no intention, to keep them separate. Hence it was held that they were not liable to levy under an execution as personal property. It is true that the Court in *Patton v. Moore* employed the language quoted by this Court, but it is elementary that the language of an opinion, however general, must be read in the light of the facts then at bar. That language was not ap-

292 plied, nor is it applicable, to the case of a conditional vendor or chattel mortgagee of personal property, for the plain reason that in the latter situation the relations and intention of the parties are different. If any one thing is to be deduced from all of the authorities it is that the situation, relation and intention of the parties involved in the supposed annexation of chattels to realty, is a decisive point in determining whether or not the chattel status of the property has been maintained.

V.

But it is unnecessary to rely on general principles, for a comparison of *Patton v. Moore* with *Hurxthall v. Hurxthall*, 45 W. Va., 584, and *First National Bank v. Hyer*, 46 W. Va., 13; of *Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490, with *Wicks v. Island Park Assn.*, 229 Pa. 400, 78 Atl. 934; and of *Green v. Phillips*, 26 Grat. 752, and *Shelton v. Ficklin*, 32 Grat. 735, with *Monarch Laundry Co. v. Westbrook*, 109 Va. 382, 63 S. E. 1070, demonstrates completely that *Patton v. Moore* has no application to the facts in the present case. The petitioner is unable to comprehend why *Patton v. Moore* should be regarded as ruling the present controversy, while *Hurxthall v. Hurxthall*, 45 W. Va. 584, and *First National Bank v. Hyer*, 46 W. Va. 13, referring to the rights of a chattel mortgagee or a conditional vendor, and *Webster Lumber Co. v. Keystone Lumber Co.*, 51 W. Va. 545, and *Gartlan v. Hickman*, 56 W. Va. 75, upholding the efficacy of intention to prevent annexation, are accorded no weight and ignored in the opinion. Even *Lazear v. Ohio Valley Steel Co.*, 65 W. Va. 105, so confidently relied on by the appellees, and however greatly distinguishable from the case at

bar and inapplicable because it was decided after the petitioner's contract was made and broken (*Kuhn v. Fairmont Coal Co.*, 215 U. S. 349), is at least colorably more apposite than the case of *Patton v. Moore*; yet it is not referred to in the opinion.

VI.

293 Having arrived at the conclusion that the tanks were by their character and supposed annexation converted into realty, the opinion easily follows with the conclusion that the after-acquired property clause was operative as again- the reservation of title, and the case of *Tippett v. Barham*, 180 Fed. 76, is cited. The petitioner has no quarrel with *Tippett v. Barham*. It relates to a state of facts and is based on a principle entirely distinguishable.

In the first place, the petitioner controverts the assumption that lies at the basis of the conclusion reached. The faulty assumption is that these tanks were annexed to the realty. They never were so annexed and never did lose their character as personalty. They were loose property and as such clearly within the rule laid down in *U. S. v. New Orleans R. R. Co.*, 12 Wall. 362, and the numerous cases following it.

Fosdick v. Schall, 99 U. S. 235.

Meyer v. Car Co., 102 U. S. 1.

Central Trust Co. v. Marietta Ry. Co., 48 Fed. 874.

Cox v. New Bern Lighting &c. Co., 151 N. C. 648, 65 S. E. 648.

Daly v. N. Y. &c. R. Co., 55 N. J. Eq. 602, 38 Atl. 205.

Wood v. Holly Mfg. Co., 100 Ala. 351, 46 Am. St. Rep. 15.

Warren v. Liddell, 110 Ala. 247, 20 So. 93.

Defiance Mach. Works v. Trisler, 21 Mo. App. 69.

J. L. Mott Iron Works v. Middle States &c. Co., 17 App. D. C. 584.

Harris v. Youngstown Bridge Co., 90 Fed. 330.

Brinkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. 89.

What is loose property within these cases? The petitioner submits that the word "loose" within these cases means exactly what it implies in the other relations of life, and that no principle or authority justifies the creation of a constructive annexation, which deprives the owner of a chattel of the benefit of its character as loose property. Loose property is property not physically
294 fastened to the realty; and property is none the less loose because it does not embrace within itself a motive power of its own, as in the case of a locomotive.

In the case at bar the opinion reads:

"The Cooperage Company entered into the transaction with the Brewing Company for the sale to the latter of the chip tanks, as we gather from the record, with both actual and constructive notice of the existence of the deed of trust, and with this knowledge fur-

nished the tanks and permitted them to become a part of the freehold. The money derived from the sale of the bonds was used, as appears, in the construction and equipment of the brewery."

And it is then said, quoting from *Tippett v. Barham*:

"We think this latter doctrine announces the correct principle, especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after-acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and received in contemplation of such accessions. In such cases the equities of the beneficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or a legal title intervenes."

The view that money was derived from the sale of the bonds and applied to the construction and equipment of the brewery, is widely variant from the uncontroverted facts appearing in this record. The evidence shows, without contradiction, that the bonds were not sold to raise money for the construction or equipment of the brewery, and that no money derived from any sale thereof was applied to such construction or equipment. The bonds, together with certain stock of the Brewing Company, were issued to Bollinger Bros., after the construction and equipment of the brewery had been completed by Bollinger Bros., with the exception of the installation of one ice machine, the steel chip tanks, "and a few other small things." From the supply of the ice machine, chip tanks, "and a few other small things" Bollinger Bros. were released in a settlement made after the residue of their contract had been performed, and in this settlement the bonds and stock were issued with an allowance to the Brewing Co. by reason of the failure to supply the omitted equipment. The following excerpt from the statement in the petitioner's original brief (pp. 2 and 3) sets forth the facts accurately and would appear to have been overlooked:

"The appellee, Bollinger Bros., a resident and citizen of Pennsylvania, contracted with the Brewing Co. in 1904 or 1905, (Rec. p. 125) to furnish the plans and specifications (Rec. p. 118) for, and to construct and equip the complete brewery. Their contract embraced the furnishing of all machinery therefor, including the steel chip casks or tanks. They fulfilled their contract, except the furnishing and installation of one ice machine, the steel chip casks, 'and a few other small things.' (Rec. p. 113.)

"After having proceeded thus far with the performance of the contract, and after some precedent verbal negotiations, Bollinger Bros. and the Brewing Co. entered into an agreement on May 11,

1908 (Rec. p. 132), whereby the Brewing Co. accepted the brewery in its then uncompleted condition, and a settlement was made between them. (Rec. pp. 67, 103, 113, 114, 123, 124, 132.) The cause of this non-completion of the brewery and of the settlement so made, was the lack of funds on the part of the Brewing Co.

296 S. W. Bollinger, president of Bollinger Bros., testified: 'They had no money to pay us. * * * Well, they didn't have the money.' And the non-installation of the chip casks by Bollinger Bros. was, he says: 'By reason of the completion of the building being held up for lack of funds.' (Rec. p. 126.)

'In the settlement, Bollinger Bros. received from the Brewing Co. \$40,000 in principal amount, being the total issue (Rec. pp. 129, 230), of the Brewing Co.'s bonds, secured by the first deed of trust, dated December 1, 1906, and \$50,000 par value out of the total authorized capital stock of \$150,000 (Rec. p. 230) of the Brewing Co., the stock being estimated, for the purpose of the settlement, at ninety cents on the dollar. (Rec. pp. 113, 114, 123, 124, 128, 129.) For the ice machine, chip casks and other things which Bollinger Bros. had failed to supply, the Brewing Co. was allowed, in this settlement, a deduction of \$10,000, it being agreed by Bollinger Bros. that it would furnish the omitted articles if, within one year, the Brewing Co. would raise and pay to Bollinger Bros. this \$10,000. But, upon learning thereafter that the Brewing Co. had no ready cash, Bollinger Bros. later refused to furnish the chip cask, and put the appellant and the Brewing Co. into direct communication with each other. (Rec. pp. 113, 114.)'

An analysis of *Tippett v. Barham* exhibits an entirely distinct state of facts. In that case, as in substantially all of the Federal cases which have been decided in favor of the mortgagee, there was involved the property of a quasi-public corporation, the preservation of the integrity of which, upon special grounds of public interest and necessity, has always been aided by the courts. Apt illustrations will readily occur, as in the assertion of jurisdiction to foreclose a mortgage covering a railroad situate in several states (*Miller v. Dows*, 94 U. S. 444), and the creation of the "six months rule." (Cf. *Wood v. Guarantee Trust Co.*, 128 U. S. 416; *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, and cases cited.) The

297 distinction, while not frequently referred to, was expressly recognized in *Porter v. Pittsburg Steel Co.*, 122 U. S. 267.

The Court there say:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become annexed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contract in the present case."

But a broader line of demarcation exists. In *Tippett v. Barham*, as in the other cases in which the after-acquired property clause has been accorded superiority, the after-acquired property was of such character and was employed in such manner that it became an integral part of the mortgaged realty and completely lost its separate identity. And in almost every instance the reserved title or lien was attempted to be asserted, not against the after-acquired property in the form in which it was brought onto the mortgaged land, but against the after-acquired property in a totally new and distinct form, as a different entity, created by the very act of annexing it to, and merging it in, the land.

In every case, where the reservation of title or lien of the claimant accompanied into the possession of the mortgagor the identical, separate thing against which the reservation of title or lien was sought to be enforced, whether that thing be personality (*U. S. v. New Orleans R. R. Co.*, *Fosdick v. Schall*, *Fosdick v. Car Co.*, *Myer v. Car Co.*, *Holly Mfg. Co. v. New Chester Water Co.*, *J. L. Mott Iron Works v. Middle States Const. Co.*, *Cox v. New Bern Light & F. Co.*, *Wood v. Holly Mfg. Co.*) or whether it be real estate (*Bear Lake Irr. Co. v. Garland*, 164 U. S. 1, *Harris v. Youngstown* 298 *Bridge Co.*, *Botsford v. New Haven &c. R. Co.*, 41 Conn. 454), the reservation of title or lien has been sustained, as against the prior mortgagee.

But where the thing to which the title or lien is sought to be retained, becomes, by the very fact and method of annexation, physically merged in the realty, as an integral part thereof, so that, when the day for the enforcement of the reservation arrives, the chattel brought upon the premises no longer exists, and the reservation must be upheld, if at all, by fixing it to a new thing created by the annexation in contemplation when the mortgagor acquired the chattel, and the enforcement of the reservation must be destructive, not only of the integrity of the realty, but of the changed form which the chattel has assumed by its merger with the realty, a very different case arises.

In *Tippett v. Barham*, the subject matter was a waterworks standpipe, the property of a quasi-public corporation, not brought upon the land, accompanied with a reservation of title, but constructed on the incumbered land by means of materials furnished and labor performed. The standpipe came into existence for the first time on the mortgaged land. It was a new thing created by the very fact and act of annexation to the realty, without which it would have had no existence at all. It was erected upon a foundation of concrete twenty-five feet in diameter and ten feet in depth, and attached to the foundation by anchor bolts ten feet long and two inches in diameter, imbedded in the foundation. The standpipe itself was eighteen feet in diameter and one hundred and forty feet high above the top of the foundation. That it could have been removed from the land in its entirety was practically impossible. Removal could have been accomplished only by the dismantling of the structure, and this is best manifested by the fact that the contractor pro-

ceeded, not for the specific recovery of the standpipe, but for a preferential payment of the contract price. The very nature of the property involved distinguishes this case from that at bar, wherein it was fully proved that the chip tanks can be removed, without injury either to the tanks or to the brewery. And this distinction is recognized in the opinion in *Tippett v. Barham*.

The distinction between *Tippett v. Barham* and the case at bar, distinguishes also the case at bar from those involving bridges, docks and other structures of like character. It may be conceded that the facts of one case may carry it a little closer than another to the line separating the class of cases embracing *Tippett v. Barham* from the class embracing the case at bar. However difficult it may be to classify the facts of a particular case, the line separating the two classes is existent and plain, and it is equally clear that *Tippett v. Barham* and the case at bar fall upon opposite sides of that line. It may be objected that the difference between the two classes of cases is a difference only of degree. But Mr. Justice Holmes in a recent case took occasion to state that there are many such differences in the law, and they are none the worse for being mere differences of degree.

In conclusion the petitioner repeats what was said at the outset, that this petition is filed not in mere protest against an adverse decision, nor alone against the errors which, in the view of the petitioner, have intervened in the disposition of this case. If the hurt were confined to the mere loss of these specific tanks, the petitioner would be content to accept defeat as one of the fortunes of war. But, as indicated above, the scope of the decision is not so limited. It affects an entire line of credit, extended by the petitioner throughout the United States, on the faith of similar reservations of title as security for purchase money. Not only the petitioner, but a vast number of other manufacturers furnishing property under like contracts are affected, and it is safe to say that, by this decision, the security for millions of dollars of indebtedness has been rendered worthless. Under these circumstances, the petitioner deems itself justified, not only on the ground of self-interest, but in performance of a service to the large business interests affected by this decision, in praying a rehearing of this cause; and the petitioner does respectfully pray that the same may be reheard.

DETROIT STEEL COOPERAGE COMPANY.

Petitioner and Appellant.

By ORLA B. TAYLOR,
CHARLES N. KIMBALL,
WALTER S. SUGDEN,
GEORGE M. HOFFHEIMER,

Its Counsel.

ORLA B. TAYLOR,
CHARLES N. KIMBALL,
WALTER S. SUGDEN,
GEORGE M. HOFFHEIMER,

Counsel for Petitioner and Appellant.

We certify that we have examined the case referred to in the foregoing petition, and are of opinion that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, therein mentioned, is erroneous in the particulars mentioned in said petition, and that a rehearing should be allowed as therein prayed.

CHARLES N. KIMBALL,
GEO. M. HOFFHEIMER,

Counsel.

301

Order Staying Mandate.

Filed and Entered May 7, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,

VS.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H. SKAGGS, F.
HOGENMILLER, et al., Appellees.

It appearing to the court that a petition for a rehearing was presented by the appellant in this cause on May 2, 1912,

It is ordered that the mandate in this cause be, and the same is hereby, stayed pending the action of the court on said petition.

May 7, 1912.

NATHAN GOFF,
Circuit Judge Presiding.

Order Denying Rehearing.

Filed and Entered June 1, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,

VS.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H. SKAGGS, F.
HOGENMILLER, et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

This court having at its February Term, 1912, rendered its decision affirming the decree of the said Circuit Court appealed from in this cause, and the appellant, by its counsel, having on the 2nd day of May, 1912, presented to the court a petition for a rehearing of the cause, and the same having been carefully considered,

It is now here ordered by this court, that the rehearing asked for, be, and the same is hereby denied, the Hon. James E. Boyd, District Judge for the Western District of North Carolina, and the Hon. John C. Rose, District Judge for the District of Maryland, being of opinion to so decree, while the Hon. J. C. Pritchard, Circuit Judge, is of opinion that for reasons filed by him in this cause, that the rehearing asked for should be granted.
June 1, 1912.

NATHAN GOFF,
Circuit Judge Presiding.

Memorandum Opinion on Rehearing.

Filed June 1, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,
versus

SISTERSVILLE BREWING COMPANY, GALE JUSTUS, R. H. SKAGGS, F. HOGENMILLER, et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

On Petition for Rehearing.

[Petition Presented May 2, 1912; Decided June 1, 1912.]

Before Pritchard, Circuit Judge, and Boyd and Rose, District Judges.

Charles N. Kimball and George M. Hoffheimer (Orla B. Taylor and Walter S. Sugden on briefs) for appellant, and Thomas P. Jacobs (Arlen G. Swiger on brief) for appellees.

Memorandum Opinion.

PRITCHARD, *Circuit Judge*:

I concurred in the opinion rendered in this case, but after a careful reading of the petition for rehearing and also the case of Tippet & Wood v. Barham, 180 Fed., p. 76, I am of the opinion that inasmuch as the vendor reserved a lien on the tanks in controversy for the purchase price, which was duly recorded in accordance with the laws of West Virginia, that the title never passed to the mortgagee under the after acquired property clause but remained in the vendor. Therefore, I think a rehearing should be granted.

Petition of Appellant for Further Stay of Mandate.

Filed June 7, 1912.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

In the United States Circuit Court of Appeals for the Fourth Circuit.

Appeal. No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,
 v.
 SISTERSVILLE BREWING COMPANY et al., Appellees.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Your petitioner, Detroit Steel Cooperage Company, the appellant in the above entitled cause, respectfully represents that on the 9th day of April, 1912, the United States Circuit Court of Appeals for the Fourth Circuit rendered an opinion and entered a judgment in the above entitled cause, affirming the decree of the Circuit Court; that on the 2nd day of May, 1912, said petitioner presented to said United States Circuit Court of Appeals its petition for a rehearing of said cause; that on the 1st day of June, 1912, said last mentioned court denied said rehearing, the Honorable James E. Boyd, District Judge for the Western District of North Carolina, and the Honorable John C. Rose, District Judge for the District of Maryland, being of opinion to so decree, while the Honorable J. C. Pritchard, Circuit Judge, was of opinion, for reasons filed by him in said cause, that the rehearing asked for should be granted; that the mandate of the

304 District Court of the United States for the Northern District of West Virginia has not yet been issued; but that said mandate will immediately be issued, unless the issue of said mandate shall be stayed.

Your petitioner further represents that it desires and intends to apply to the Supreme Court of the United States for a writ of certiorari to review said judgment of said United States Circuit Court of Appeals; that, as your petitioner has been informed by the clerk of said Supreme Court, and your petitioner therefore represents, said Supreme Court intends to and will adjourn finally its Term of October, 1911, on Monday, the 10th day of June, 1912, and Friday, the 7th day of June, 1912, will be the last motion day of said term, on which a petition for a writ of certiorari could be submitted; that a certified copy of the order denying said rehearing and of the memorandum of Judge Pritchard was not received by your petitioner until the 3rd day of June, 1912; that your petitioner has not had sufficient time since receiving said certified copy of said order and said memorandum, in which to obtain copies of the record, prepare and print the petition for a writ of certiorari and brief required by the rules

of said Supreme Court, and file and submit the same to said Supreme Court; that additional time is and will be necessary to enable your petitioner to obtain copies of said record and prepare, print and file said petition for a writ of certiorari and brief; and that said petitioner will have no opportunity to submit its said petition for a writ of certiorari to said Supreme Court until the commencement of the Term of October, 1912, of said Supreme Court, which Term of October, 1912, will commence on the second Monday in October, 1912, to-wit, the 14th day of October, 1912.

Your petitioner therefore prays that the issue of said mandate may be stayed for such reasonable time as may seem just, and that it may have such other and further order as the premises may require. And your petitioner will ever pray, etc.

DETROIT STEEL COOPERAGE COMPANY,

Appellant and Petitioner.

By GEO. M. HOFFHEIMER, *of Counsel.*

ORLA B. TAYLOR,

CHARLES N. KIMBALL,

WALTER S. SUGDEN,

GEO. M. HOFFHEIMER,

Counsel for Appellant and Petitioner.

305 UNITED STATES OF AMERICA.

Northern District of West Virginia, County of Harrison, ss:

Geo. M. Hoffheimer being duly sworn on his o-th says that he is of counsel for Detroit Steel Cooperage Company, the appellant and petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; and that the same is true in substance and in fact.

GEO. M. HOFFHEIMER.

Taken, subscribed and sworn to before me this 6th day of June, 1912.

CHARLES B. JOHNSON,

*No-ary Public in and for the County of
Harrison and State of West Virginia.*

My commission expires on the 19 day of October, 1920.

Order Further Staying Mandate.

Filed June 7, 1912.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

In the United States Circuit Court of Appeals for the Fourth Circuit.

Appeal No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,
v.
SISTERSVILLE BREWING COMPANY et al., Appellees.

On reading and filing the petition of Detroit Steel Cooperage Company, appellant, it is ordered that the issue of the mandate in the above entitled cause be and the same is hereby stayed pending the application of appellant to the Supreme Court for a writ of certiorari. This 7th day of June, 1912.

J. C. PRITCHARD,
Circuit Judge.

306

*Clerk's Certificate.*UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 17th day of June, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
*Clerk of the United States Circuit
Court of Appeals, Fourth Circuit.*

307 United States Circuit Court of Appeals, Fourth Circuit.

No. 1081.

DETROIT STEEL COOPERAGE COMPANY, Appellant,

vs.

SISTERSVILLE BREWING COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

Whereas, upon the petition of Detroit Steel Cooperage Company, appellant, a writ of certiorari was granted by the Supreme Court of the United States on the 4th day of November, 1912, which writ was issued and bears date of the 7th day of November, 1912, requiring the record and proceedings in the above entitled cause to be certified to the Supreme Court of the United States:

Now, therefore, it is stipulated and agreed by and between said Detroit Steel Cooperage Company, appellant, and Sistersville Brewing Company, Gale Justus, R. H. Skaggs, F. Hogenmiller; G. M. Beaver, A. Osman, Daniel J. O'Neil, Clem Polen, H. B. Shriver, ex-sheriff of the County of Tyler, in the State of West Virginia, City of Sistersville, Wm. E. Cummins, as Collector and Treasurer of said City of Sistersville, John S. Sell, as Trustee, J. Hanford McCoy, in his own right and as Receiver of said Brewing Company, Abijah Hays, as Trustee, W. H. Kirk, Charles Claus, as Trustee, Carl Benz, Henry Feuchtswanger, Joseph Feuchtswanger, Aaron Feuchtswanger, George W. Hartman, Bollinger Brothers, and County Court of Tyler County, West Virginia, appellees, that the certified transcript of record filed with the petition for said writ of certiorari shall be taken and stand as a return to said writ, and that no new certified transcript of record need be made or returned to the Supreme

308 Court of the United States.

Dated this 9th day of November, 1912.

CHAS. N. KIMBALL,
WALTER S. SUGDEN,
ORLA B. TAYLOR,
GEO. M. HOFFHEIMER,

Counsel for Appellant.

ARLEN G. SWIGER,
THOS. P. JACOBS,

Counsel for Appellees.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed November 20, 1912, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 20th day of November, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 7th day of November, 1912, by annexing hereto a certified copy of the stipulation of the
309 attorneys of record, that the certified transcript of record filed with the petition for said writ of certiorari shall be taken and stand as a return to said writ.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 20th day of November, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

*Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.*

310 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Detroit Steel Cooperage Company is appellant, and Sistersville Brewing Company et al. are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Northern District of West Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme

311 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventh day of November, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

312 [Endorsed:] File No. 23,400. Supreme Court of the United States, October Term, 1912. No. 825. Detroit Steel Cooperage Co. vs. Sistersville Brewing Co. et al. Writ of Certiorari. The execution of the within writ appears from the schedules thereunto annexed. Henry T. Melony, Clk U. S. C. C. Appeals.

313 [Endorsed:] File No. 23,400. Supreme Court U. S., October Term, 1912. Term No. 825. Detroit Steel Cooperage Co., Petitioner, vs. Sistersville Brewing Company et al. Writ of certiorari and return. Filed November 21, 1912.

Office Supreme Court, U. S.
FILED.

OCT 23 1912

JAMES H. McKENNEY,

CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. ~~825~~. 368

DETROIT STEEL COOPERAGE COMPANY, *Petitioners*

vs.

SISTERSVILLE BREWING COMPANY et. al., *Respondents*

PETITION FOR WRIT OF CERTIORARI

GEORGE M. HOFFHEIMER,
ORLA B. TAYLOR,
CHAS. N. KIMBALL,
WALTER S. SUGDEN,
Counsel for Petitioner.

THE UNIVERSITY OF CHICAGO

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. —

DETROIT STEEL COOPERAGE COMPANY, *Petitioner*
vs.
SISTERSVILLE BREWING COMPANY, GALE JUSTUS,
R. H. SKAGGS, F. HOGENMILLER, G. M. BEAVER,
A. OSMAN, DANIEL J. O'NEIL, CLEM POLEN, H.
B. SHRIVER, ex-sheriff of the County of Tyler, in the
State of West Virginia, CITY OF SISTERSVILLE, WM.
E. CUMMINS, as Collector and Treasurer of said City
of Sistersville, JOHN S. SELL, as Trustee, J. HAN-
FORD McCOY, in his own right and as Receiver of said
Brewing Company, ABIJAH HAYS, as Trustee, W. H.
KIRK, CHARLES CLAUS, as Trustee, CARL BENTZ,
HENRY FEUCHTWANGER, JOSEPH FEUCHT-
WANGER, AARON FEUCHTWANGER, GEORGE W.
HARTMAN, BOLLINGER BROTHERS, and COUNTY
COURT OF TYLER COUNTY, West Virginia, *Respon-*
dents.

To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Your petitioner, Detroit Steel Cooperage Co., respect-
fully represents that it is aggrieved by a judgment of the
United States Circuit of Appeals for the Fourth Circuit en-
tered on the 9th day of April, 1912, affirming a decree of the

Circuit Court for the Northern District of West Virginia. A certified copy of the entire transcript of record of this case, including the proceedings in the Circuit Court of Appeals, is herewith furnished as an exhibit to this petition.

The matter here involved is the title to thirteen steel chip tanks in the brewery of Sistersville Brewing Company at Sistersville, West Virginia, which on August 8, 1908, your petitioner contracted with the Brewing Co. to furnish, for the price of \$5,480, the contract containing the following clause (Rec. p. 108):

"It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified, and any notes and acceptances that may be given on account of any such payments, shall have been fully paid; and in case of default in any of said payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures."

Under this contract, your petitioner delivered and installed the tanks in August, 1908, and has been paid \$1,000.

Therefore the Brewing Co. on December 1, 1906, had executed a mortgage deed of trust, covering all of its property, with an after-acquired property clause, to secure a bond issue of \$40,000. This mortgage was recorded on February 2, 1907. No money derived from these bonds went into the construction or equipment of the brewery, or the purchase of the tanks. On May 11, 1908, the Brewery Co., being without money, made a settlement with the contractor who had built and partially equipped the brewery, but had installed no chip tanks, in which settlement the whole \$40,000 in bonds, together with certain stock, were issued

to the contractor in payment for the construction and partial equipment already performed and furnished. A deduction was made from the original contract price, by reason of the contractor's omission to install the tanks, and the Brewing Co. was left to obtain the tanks as best it might.

On April 9, 1909, the holders of some of said bonds, basing jurisdiction on diversity of citizenship, filed a bill in the Circuit Court for the Northern District of West Virginia, praying for foreclosure of the mortgage and the appointment of a receiver. The Circuit Court appointed a receiver, who took into his custody all the property of the Brewing Co., together with said tanks, and a decree was entered, directing the receiver to make sale of all the property, including the tanks.

To the foreclosure suit your petitioner was never joined as a party; and, following the decree of sale in that suit, your petitioner filed its present ancillary bill, praying an injunction against the sale of the tanks under the foreclosure decree, and the recovery of said tanks or payment of the balance of the purchase price due thereon. The plaintiffs in the foreclosure suit answered your petitioner's bill, and, a replication being filed, evidence was taken.

The proofs, which were substantially without conflict, established: (1) that the petitioner and the Brewing Co., by the express terms of their above mentioned contract, evinced an intention to preserve the status of the tanks as chattels, and to prevent their annexation to the realty; (2) that the tanks were not adapted peculiarly to the purposes of this particular brewery; (3) that there was no physical annexation of the tanks to the realty; (4) that the separate identity and physical separateness of the tanks were preserved; (5) that the removal of the tanks would be accompanied with no

injury to the tanks; (6) that no injury to the brewery or its other equipment would result from or be incident to the removal of the tanks, such removal requiring only the taking down of a brick wall within an archway, which was planned and constructed for the very purpose of permitting the entry and exit of chip tanks; (7) that the removal and restoration of this brick wall would in nowise injure the brewery or any of its equipment, and the cost thereof would not exceed \$50; (8) that six of the thirteen tanks were never used by the Brewing Co.; (9) that, in the event of the removal of the tanks, a substitute would be necessary, in order that the Brewing Co. might produce marketable beer; and (10) that the Brewing Co. could readily obtain a substitute elsewhere, if it paid for the same.

The Circuit Court (Dayton, District Judge) and the Circuit Court of Appeals (Pritchard, Circuit Judge, and Boyd and Rose, District Judges) held that the tanks had been installed by your petitioner as part of the brewery, with notice of the preexisting mortgage; that the tanks had been appropriated by your petitioner to the use of the brewery, and were necessary for its operation; that the tanks could not be removed without tearing down the brick wall within the arch; and that, therefore, the tanks became part of the realty, to which the mortgage attached, as a lien superior to and having priority over your petitioner's reservation of title. (Rec. p. 269; 195 Fed. 447.) A petition for rehearing was denied. But Pritchard, Circuit Judge, retracted his former opinion, and filed the following memorandum (Rec. p. 302):

"I concurred in the opinion rendered in this case, but after a careful reading of the petition for rehearing and also the case of *Tippett and Wood v. Barham*, 180 Fed. p. 76, I am of the opinion that in-

asmuch as the vendor reserved a lien on the tanks in controversy for the purchase price, which was duly recorded in accordance with the laws of West Virginia, that the title never passed to the mortgagee under the after acquired property clause but remained in the vendor. Therefore, I think a rehearing should be granted."

Did the judgment of the Circuit Court of Appeals go no further than to adjudicate erroneously the title to these thirteen tanks, your petitioner would make no complaint; but an unjust precedent has been established, effecting an entire line of credit extended by your petitioner throughout the United States, on the faith of similar reservations of title. Not only your petitioner, but a large number of other manufacturers furnishing property under like contracts, are prejudiced; for nothing is more universal in this day than the sale of boilers, dynamos, generators and other ponderous machinery, with title reserved to the vendor pending payment of the price. To the security of every dollar of such credits the reasoning of the Circuit Court of Appeals is as applicable and destructive as in the case at bar. And if that reasoning be sound, it is equally apposite in the case of a chattel mortgage taken to secure purchase money.

The prejudice to your petitioner and others similarly situated, arising out of the present decision of the Circuit Court of Appeals, is accentuated, when it is remarked that, even in West Virginia and those other states whose highest courts are in accord with the Supreme Court of Appeals of West Virginia, every reservation of title is apt to fall, as in the case at bar, without the volition of the vendor, into the jurisdiction of a federal court. Any luckless purchaser may become bankrupt and involve in his misfortune his vendor, who would have been safe enough in the state court, but

who must lose his property, through no fault of his own, because, indeed, the federal court cannot or will not agree with the state court in a point in which it is its duty to agree. This anomalous situation requires correction at the hands of this court.

As a matter of general commercial importance, the cause in hand is quite as worthy of review as was *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U. S. 373.

The error into which the Circuit Court of Appeals fell, in disposing of this case, arose primarily from its failure to recognize:

1. The existence of a conflict of authority as to the relative rights of a conditional vendor or mortgagee of a chattel on the one hand, and of the mortgagee of land upon which the chattel is brought, on the other hand;

2. The limitations imposed upon a federal court in deciding a question of local law;

3. The local law as set forth in the decisions of the Supreme Court of Appeals of West Virginia; and

4. The true scope of certain decisions of this Court, which were permitted by the Circuit Court of Appeals to outweigh the decisions of the Supreme Court of Appeals of West Virginia.

By this process the Circuit Court of Appeals arrived at a conclusion in direct conflict with the decisions of the Supreme Court of Appeals of West Virginia, the decisions of at least two other Circuit Courts of Appeals, and the decisions of this Court.

In a valuable note in 1 British Ruling Cases, 25, reviewing and summing up the cases, it is said:

“In the United States the preponderance of authority is to the effect that where the removal of

the fixture will not materially injure the premises, a seller thereof, retaining title thereto, may assert his rights as against a prior mortgagee of the realty. * * * The doctrine that where the fixtures may be removed without material injury, the seller may enforce his lien as against the mortgagee of the realty is applicable where the seller of the fixture has taken a chattel mortgage thereon."

The foregoing statement correctly sets forth the law of West Virginia; and is supported by numerous cases elsewhere, prominent among which are *Binkley v. Forkner*, 117 Ind. 176; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Tift v. Horton*, 53 N. Y. 377; *Eaves v. Estes*, 10 Kans. 314; *Edwards & B. Lumber Co. v. Rank*, 57 Neb. 323. They are based upon the principle that the real estate mortgagee is deprived of nothing, by way of security, which he had or was entitled to, at the time when he took the mortgage, and that it is equitable that the intention expressed in the contract of conditional sale or chattel mortgage should be enforced.

On the other side, it is held that the real estate mortgagee is entitled to the benefit of all accessions to the realty, and that he cannot be deprived of this right by any agreement between a conditional vendor and vendee, or chattel mortgagor and mortgagee, to which he was not a party and has not given his assent. This rule, prevalent in Massachusetts, has been adopted in some other states (*Hunt v. Bay State Iron Co.* 97 Mass. 279; *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519; *Fuller-Warren Co. v. Horton*, 110 Wis. 80.)

Though the substantive question involved is one of local law, the Circuit Court of Appeals has rendered an

opinion and arrived at a result, flatly contradictory of the rulings of the Supreme Court of Appeals of West Virginia in two cases (*Hurxthall v. Hurxthall*, 45 W. Va. 584; *First Nat. Bank v. Hyer*, 46 W. Va. 13) and of the principles announced in two others (*Webster Lumber Co. v. Keystone Lumber Co.* 51 W. Va. 545; *Garltan v. Hickman*, 56 W. Va. 75.)

In *Hurxthall v. Hurxthall*, *supra*, a mill and the land on which it stood were covered by a deed of trust in the nature of a mortgage. The owner purchased necessary milling machinery and installed it in the mill, the vendor taking a deed of trust in the nature of a chattel mortgage, to secure the payment of the purchase money. In a contest between the holder of the deed of trust on the real estate and the vendor of the machinery, it was held, quoting *Binkley v. Forkner*, *supra*, and citing with approval *Campbell v. Roddy*, *Eaves v. Estes*, and *Tift v. Horton*, *supra*:

"A chattel mortgage is effectual to preserve the character of the chattels mortgaged, as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate or the buildings thereon. If the detachment would occasion some diminution in the value of the realty as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case."

In *First National Bank v. Hyer*, *supra*, the same doctrine was enforced as between the conditional vendor of a boiler, engine and other sawmill machinery, and the prior mortgagee of the real estate.

In *Webster Lumber Co. v. Keystone Lumber Co.*, *supra*, it was laid down that parties may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon, the agreement of the parties superseding the law, and being binding alike upon the original parties, subsequent mortgagees and purchasers with notice.

In *Gartlan v. Hickman*, *supra*, it was held, quoting from *Edwards & B. Lumber Co. v. Rank*, *supra*, and *A. T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, that the chief test is to inquire, whether the party annexing the chattel intended it to be a permanent annexation to the freehold, and that before a chattel can be converted into a fixture by actual annexation, the intention of the parties and the uses to which it is put must combine to change its nature.

The Circuit Court of Appeals rested its opinion upon two cited cases, *Patton v. Moore*, 16 W. Va. 428, and *Tippett v. Barham*, 180 Fed. 76, both involving states of facts and relations of parties entirely distinct from those in the case at bar. Viewing the opinion in *Tippett v. Barham* apart from its facts, the inappropriateness of that case as an authority in West Virginia is cogently indicated by its express adoption of the Massachusetts rule, and its repudiation of *Binkley v. Forkner*, *Campbell v. Roddy*, *Eaves v. Estes*, *Tift v. Horton*, and *Edwards & B. Lumber Co. v. Rank*, *supra*, which previously had been approved and adopted as the basis of decision in *Hurxthall v. Hurxthall*, *First Nat. Bank v. Hyer*, *Webster Lumber Co. v. Keystone Lumber Co.* and *Gartlan v. Hickman*, *supra*.

The disagreement with the Supreme Court of Appeals of West Virginia, is the more marked, because the Circuit Courts of Appeals of the Third and Eighth Circuits, and the Court of Appeals of the District of Columbia, have arrived

at conclusions in accord with those of the Supreme Court of Appeals of West Virginia and in opposition to those of the court below. See *Holly Mfg. Co. v. New Chester Water Co.*, 53 Fed. 19, which is in accord with *Wicks v. Island Park Assn.*, 229 Pa. 400; *Re Sunflower State Ref. Co.*, 195 Fed. 180, which is in accord with *Eaves v. Estes*, 10 Kan. 314; and *J. L. Mott Iron Works v. Middle States, etc. Co.*, 17 App. D. C. 584.

The ruling of the Circuit Court of Appeals is no less at war with the holdings of this court. In a series of cases, beginning with *U. S. v. New Orleans R. R.*, 12 Wall. 362, this court has held repeatedly that a prior mortgagee, with an after-acquired property clause, stands in no better situation than the mortgagor, as respects the after-acquired property; and that the prior mortgage can only attach to the after-acquired property, subject to those conditions and liens which accompanied such property into the possession of the mortgagor. And upon this principle a reservation of title in a contract of conditional sale, has been accorded precedence over a prior mortgage, with after-acquired property clause (*U. S. v. New Orleans R. R.*, *supra*; *Fosdick v. Schall*, 99 U. S. 239, 251; *Fosdick v. Car Co.*, 99 U. S. 256; *Myer v. Car Co.*, 102 U. S. 1; *Bear Lake Irr. Co. v. Garland*, 164 U. S. 1, 16, 23; *York Mfg. Co. v. Cassell*, 201 U. S. 344.)

In another class of cases in this court, the prior mortgagee has prevailed; but in all of those cases the physical annexation was unequivocal and complete. The after-acquired property possessed no separate identity, and was susceptible of no separate liens. The reservation of title or lien was sought to be asserted, not against the after-acquired property in the form in which it was brought upon the mortgaged land, but against a new thing, which came into

existence by the very fact and act of annexation to the mortgaged land. Quantities of materials were carried to the mortgaged land, and there lost their identity by conversion into a bridge, a dock, a railroad track, or other like structure. Physical annexation to, and merger with, the land, took place in the very process of this conversion. When the day for assertion of the reservation of title or other incumbrance arrived, it must have been asserted, if at all, not against the materials in the form in which they were brought upon the land, but against the new thing brought into being by the process of annexation. Its enforcement could only have been accomplished by the disintegration of the structure against which it was directed. Such were the cases of the bridge in *Porter v. Pittsburg Steel Co.*, 122 U. S. 267; the dock in *Toledo & B. R. Co. v. Hamilton*, 134 U. S. 296; the railroad tracks in *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. 254, *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. 459, and *Thompson v. White Water, etc., R. Co.*, 132 U. S. 68; and the water works stand pipe in *Tippett v. Barham*, 180 Fed. 76. All of these cases, moreover, involved quasi-public property, in the preservation of the integrity of which there was a public interest. (See remarks of Mr. Justice Blatchford in *Porter v. Pittsburg Steel Co.*)

In *U. S. v. New Orleans R. R.*, and *Porter v. Pittsburg Steel Co.*, the court referred to the distinction between "loose property" and other property. In the former case it is said:

"Had the property sold by the government to the Railroad Co. been rails * * * or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate

ownership and separate liens, such liens, if binding on the Railroad Co. itself, are unaffected by a prior general mortgage, given by the Company and paramount thereto."

The phrase "loose property," appears to have induced in some very respectable courts (including the Circuit Court of Appeals of the Fourth Circuit in *Tippett v. Barham* and the present case; and the Circuit Court of Appeals of the Sixth Circuit in *Phoenix Iron Works Co. v. New York S. & T. Co.*, 83 Fed. 757, and *Evins v. Kister*, 92 Fed. 836) an understanding that the scope of *U. S. v. New Orleans R. R.* was confined to property mobile in itself, such as a locomotive or a car. But your petitioner thinks it clear that this court intended to do no more than to point out the distinction, which it has enforced in its subsequent decisions, between property retaining a separate identity, on the one hand, and property physically merged with the real estate, on the other hand; and that the tanks in the case at bar, and similar things, fall within the category of "loose property." In *Bear Lake Irr. Co. v. Girland*, *supra*, the subsequently acquired property was in no literal sense loose; but the identity was preserved, and the prior mortgagee was defeated in this court.

Your petitioner herewith files a brief in support of this petition, discussing more fully and at large the errors which, it conceives, were committed by the Circuit Court of Appeals.

Wherefore, your petitioner prays that a writ of *certiorari* may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding it to certify and send to this Court a full and complete transcript of the record and all proceedings in said court, and that this Hon-

orable Court will thereupon proceed to correct the errors complained of, reverse the judgment of the Circuit Court of Appeals and the decree of the Circuit Court, and grant to your petitioner such other and further order and relief as the nature of the case may require. And your petitioner will ever pray, etc.

DETROIT STEEL COOPERAGE COMPANY,

Petitioner.

By GEORGE M. HOFFHEIMER,

Of its Counsel.

GEORGE M. HOFFHEIMER,

ORLA B. TAYLOR,

CHARLES N. KIMBALL,

WALTER S. SUGDEN,

Counsel for Petitioner.

**United States of America,
Northern District of West Virginia,
County of Harrison, SS:**

George M. Hoffheimer, being duly sworn, on his oath says that he is of counsel for the petitioner above named; that he has read the foregoing petition and knows the contents thereof; and that the same, ^{and} the allegations therein contained, are true to the best of ~~his~~ ^{his} knowledge and belief.

GEORGE M. HOFFHEIMER.

Taken, subscribed and sworn to before me this 27th day of September, 1912.

CHARLES B. JOHNSON,
Notary Public.

{ Notarial {
{ Seal }

My Commission expires on the 19th day of October, 1920.

I hereby certify that I have examined the foregoing petition and the record in the case referred to, and, in my opinion, there is error in the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, as therein complained of, and the prayer of said petition should be granted.

GEORGE M. HOFFHEIMER,
Counsel.

3
JULY SUPREME COURT, U. S.
NOTED.

OCT 24 1912

JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. ~~825~~ 368

DETROIT STEEL COOPERAGE COMPANY, *Petitioner*

vs.

SISTERSVILLE BREWING COMPANY et. al., *Respondents*

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

GEORGE M. HOFFHEIMER,
ORLA B. TAYLOR,
CHAS. N. KIMBALL,
WALTER S. SUGDEN,

Counsel for Petitioner.

INDEX

After Acquired Property—(See "After-acquired property clause.")

After-Acquired Property Clause,

Conditions and liens on superior to prior mortgage, 22-24, 17, 18, 21.

In Supreme Court of U. S.,

General rule, 22-24.

Classes of cases, 22, 24.

Distinction of cases, 22, 24.

Identity of chattel a test, 25-30.

"Loose property," 29, 30, 31.

Merged property, 25-30.

Quasi-public property, 24, 25, 26.

Brewery,

Constructed, 1, 2.

Removal of tanks, effect on, 3-5, 32.

(See "Statement.")

Brewery Co.,

- Brewery constructed, 1, 2.
- Bond issue, 2.
- Bond proceeds, how applied, 2.
- Conditional purchase of tanks, 2, 3.
- Foreclosure suit against, 5, 6, 35.
- Mortgage of, 2.

Chattel Mortgage, (See "Conditional Sale.")**Circuit Court,**

- Opinion of, 7.
- Proceedings in, 5-7.

Circuit Court of Appeals 4th Circuit,

- Conflict with,
 - Court of Appeals, D. C., 22.
 - Circuit Courts of Appeals, 21.
 - Supreme Court of W. Va., 10-21.
 - Supreme Court of U. S., 22-31.
 - Weight of authority, 10-21.
- Errors of, 7, 8.
- Opinion of, 7.
- Pritchard, J., on rehearing. 7.
- (See, "Federal Courts, conditional sales in.")

Conditional Sale,

- Chattel mortgage, doctrine the same, 11, 17.
- Contract of, 2, 3.
- Local law governs, 9.
- Prior real estate mortgage, relation to,
 - In Court of Appeals, D. C., 22.
 - In Circuit Courts of Appeals, 21.
 - In Supreme Court, U. S., 22-31.
 - In Supreme Court, W. Va., 10-21.
 - Weight of Authority, 10-21.
 - Massachusetts rule, 11, 12, 36-39.

Conditional Sale,

Recording,

Unnecessary as against prior mortgage, 22, 23.

West Virginia statute, 3.

(See "After-acquired property clause;" Federal Courts, Conditional sales in.")

Errors of Circuit Court of Appeals, 7, 8, 29.

Federal Courts, conditional sales in,

Circuit Courts of Appeals, 21, 22, 31.

Court of Appeals, D. C., 22, 31.

Supreme Court, U. S., 22-31.

Classes of cases, 22, 24.

Distinction of cases, 24, 25.

Identity of chattel, as a test, 25-30.

"Loose property," 29, 30, 31.

Merged property, 25-30.

Quasi-public property, 24, 25, 26.

(See "After-acquired property clause.")

Identity, preservation of as a test, 25-30.

Integrity Theory,

Analysis of, 32, 33.

Authorities do not support, 33-35.

Massachusetts rule does not support, 36.

Local Law,

Binding herein, 8-10.

Ignored by lower courts, 8.

Recording statute, 3.

Loose Property, 29, 30, 31.

(See "West Virginia.")

Massachusetts,

Rule, 11, 12.

Basis of rule, 37.

Integrity theory not supported by, 36.

Not applicable in West Virginia, 38, 39.

Merged Property, 25-30.

Necessity of Chattel, effect of, 32-35.

Quasi-Public Property, 24, 25, 26.

Real Estate Mortgage,

Relation to subsequent chattel mortgage, (See "Conditional Sale.")

Relation to subsequent conditional sale. (See "Conditional Sale.")

Massachusetts view of, 36, 37.

West Virginia, obsolete in, 38, 39.

West Virginia, trust deed used, 38, 39.
(See "Brewing Co.")

Recording Statute,

Prior mortgagee not entitled to protection of, 22, 23.
Of West Virginia, 3.

Removal of Chattel, conditionally sold, 32-35.

Reservation of Title, (See "Conditional Sale.")

State Courts, doctrine as to conditional sales,

Weight of authority, 10-21.

Indiana, 12, 16, 33.

Kansas, 12, 13, 16, 22.

Massachusetts, 11, 12, 36-39.

Michigan, 20.

Minnesota, 19, 31, 33.

Nebraska, 17.

New Jersey, 12, 14, 19, 31.

New York, 12, 15, 18, 19.

North Carolina, 18, 31, 35.

Pennsylvania, 17, 21.

Vermont, 20.

West Virginia, (See "West Virginia.")

Statement.

- Brewery, construction of, 1, 2.
- Bond issue, 2.
- Circuit Court, proceedings in, 5-7.
- Circuit Court of Appeals, proceedings in, 7, 8.
- Errors of, 8.
- Conditional sale of tanks, 2, 3.
- Mortgage of Brewery Co., 2.
- Executed, 2.
- Foreclosed, 6, 35.
- Tanks, conditional sale of, 2, 3.
- Description of, 3-5.
- Loose property, 29-31.
- Relation to brewery, 3-5.
- Sale in foreclosure suit, 5, 35.

Tanks,

- Annexation of, none, 4, 5.
- Bond issue proceeds not applied to, 2.
- Conditional sale of, 2, 3.
- Function of, 3.
- Installation of, 4, 5.
- Removal of, practicability and effect, 3-5.
- Cost of removal, 5.
- Sale of in Hartman Case, 6, 35.

West Virginia,

- Conditional vendor, relation to real estate mortgagee, 11, 17.
- Decisions, stated, 12-14, 17, 33.
- Weight of authority followed by 11-21.
- Federal Courts bound by, 8-10.
- Local law,
 - Decisions, 11-21, 33.
 - Federal Courts bound by, 8-10.
 - Recording statute, 3, 22, 23.

West Virginia,

Mortgage, common law, not used, 38, 39.

Deed of trust used, 38, 39.

Massachusetts doctrine not applicable, 38, 39.

Mortgagee, chattel, relation to real estate mortgage,
11, 12.

Mortgagee, real estate, relation to chattel mortgage,
11, 12.

Mortgagee, real estate, relation to conditional vendor,
11, 17.

Recording statute,

Prior mortgagee not entitled to protection of, 22, 23.

Quoted, 3.

TABLE OF CASES CITED

A

Abraham v. Casey, 179 U. S. 210.....	10
Atchison, etc., R. Co. v. Morgan, 42 Kan. 23.....	13

B

Bear Lake Irr. Co. v. Garland, 164 U. S. 1	8, 23, 24, 25, 27, 28, 30
Bernheimer v. Adams, 75 N. Y. Supp. 93, 175 N. Y. 472.....	15, 19
Binkley v. Forkner, 117 Ind. 176.....	12, 14, 16, 33
Bradley v. Fuller, 23 Pick. 9.....	37
Bryant v. Swofford, 214 U. S. 279.....	9
Burgess v. Seligman, 107 U. S. 20.....	10
Butler v. Page, 7 Mete. 40	37

C

Campbell v. Roddy, 44 N. J. Eq. 244.....	12, 14, 31, 33
Clary v. Owen, 15 Gray, 522.....	37
Cox v. New Bern Light & F. Co., 151 N. C. 648...	18, 31, 35

VIII

D

Daly v. New York, etc., R. Co., 55 N. J. Eq. 602.....	19
Davis v. Bliss, 187 N. Y. 77.....	15, 18
Dillon v. Barnard, 21 Wall. 430.....	28
Dodge v. Tulleys, 144 U. S. 451.....	10
Dooley v. Pease, 180 U. S. 126.....	10
Duffus v. Howard Furnace Co., 40 N. Y. Supp. 925....	15, 19
Dunham v. Cincinnati, etc., R. Co., 1 Wall. 254.....	27

E

Eaves v. Estes, 10 Kan. 314.....	12, 16, 22
Edwards & B. Lumber Co. v. Rank, 57 Neb. 323.....	13, 17
Etheridge v. Sperry, 139 U. S. 266.....	10
Evans v. Kister, 92 Fed. 836	31

F

First Nat. Bank v. Hyer, 46 W. Va. 13.....	8, 9, 12, 17, 39
Fosdick v. Schall, 99 U. S. 235.....	15, 22, 23, 24, 25
Fosdick v. Southwestern Car Co., 99 U. S. 256.....	23, 25
Fuller-Warren Co. v. Harter, 110 Wis. 80.....	12

G

Galveston, etc., R. Co. v. Cowdrey, 11 Wall. 459.....	27, 28
Gartlan v. Hickman, 56 W. Va. 75.....	8, 9, 13
General Electric v. Transit Equipment Co., 57 N. J. Eq. 460.....	19
Great South, F. P. Hotel Co. v. Jones, 193 U. S. 532.....	10
Gregg v. Metropolitan Trust Co., 197 U. S. 183.....	24

H

Harris v. Hackley, 127 Mich. 46.....	20
Hapgood v. Blood, 11 Gray 40.....	37
Harkness v. Russell, 118 U. S. 663.....	9
Hervey v. R. I. Locomotive Works, 93 U. S. 664.....	9
Hewitt v. Berlin Mach. Works, 194 U. S. 296.....	9
Holly Mfg. Co. v. New Chester Water Co., 53 Fed 192, 48 Fed. 879.	21, 31
Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519....	12, 36
Hunt v. Bay State Iron Co., 87 Mass 279.....	12, 36, 37
Hurxthall v. Hurxthall, 45 W. Va. 584.. 8, 9, 10, 12, 13, 14, 33, 39	

IX

J

J. L. Mott Iron Works v. Middle States, etc., Const. Co. 17 App. D. C. 584	22, 31
---	--------

K

Kuhn v. Fairmont Coal Co., 215 U. S. 349	10, 14
--	--------

L

Lazear v. Ohio Valley S. F. Co., 65 W. Va. 105.....	9, 10, 14
Loeb v. Columbia Tp., 179 U. S. 472.	10
Lorain Steel Co. v. Norfolk & B. S. T. R. Co., 187 Mass. 50	36

M

McFadden v. Allen, 134 N. Y. 489	15, 19
Meagher v. Hayes, 152 Mass. 228	12
Myer v. Western Car Co., 102 U. S. 1.....	22, 23, 25
Muller v. Dows, 94 U. S. 444	24

N

New York L. Ins. Co. v. Allison, 107 Fed. 179.....	9
New York I. & I. Co. v. Cosgrove, 62 N. Y. Supp. 372, 167 N. Y. 101.....	15
Norcross v. Norcross, 105 Mass. 265	37
Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319	19, 31, 35

O

Oil City Boiler Works v. N. J. Water & L. Co., (N. J.) 79 Atl. 451.....	15, 19
--	--------

P

Page v. Edwards, 64 Vt. 124.....	20
Page v. Robinson, 10 Cush. 99.....	37
Patton v. Moore, 16 W. Va. 428.....	9, 10, 13
Phoenix Iron Works Co. v. N. Y. S. & T. Co., 83 Fed. 757	31
Porter v. Pittsburg Steel Co., 122 U. S. 567.....	21, 22, 24, 25, 26, 29, 30, 31, 34

x

S

Stanley Co. Com'rs. v. Coler, 190 U. S. 437.....	10
Southbridge Sav. Bank v. Exeter Machine Works, 147 Mass. 542	12, 36
Sunflower State Ref. Co., Re, 195 Fed. 180	9, 21, 31
Swann v. Young, 36 W. Va. 57.....	38

T

Thompson v. Fairbanks, 196 U. S. 516	10
Thompson v. White Water, etc., R. Co., 132 U. S. 68.....	28
Tifft v. Horton, 53 N. Y. 377.....	12, 14, 15, 18, 19
Tippett v. Barham, 180 Fed. 76.	7, 9, 17, 31
Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296.....	26, 29

U

U. S. v. New Orleans R. R., 12 Wall. 362.....	8, 15, 21, 22, 24, 25, 29, 31, 34
---	--------------------------------------

W

Webster Lumber Co. v. Keystone Lumber Co.,	8, 9, 13
Wicks v. Island Park Assn., 229 Pa. 400.....	17, 21
Winslow v. Merchants Ins. Co., 4 Metc. 306.....	14, 37
Wood v. Guarantee Trust Co., 128 U. S. 416.....	24

Y

York Mfg. Co. v. Cassel, 201 U. S. 304.....	23
---	----

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No.

DETROIT STEEL COOPERAGE COMPANY, *Petitioner*,
vs.
SISTERSVILLE BREWING COMPANY, et. al., *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.

STATEMENT.

The narrow limits of the petition for a writ of certiorari render desirable some amplification of statement.

Bollinger Bros. contracted with Sistersville Brewing Co. to construct and equip a complete brewery for the latter at Sistersville, West Virginia. The building was completed in April, 1906; but the equipment and machinery were installed later. Bollinger Bros. performed this contract, except the furnishing and installation of one ice machine, the steel chip tanks, "and a few other small things." (Rec. pp. 113, 123, 118, 125.)

Pending the construction of the brewery, on December 1, 1903, the Brewing Co. executed a mortgage deed of trust covering all of its property, with an after-acquired property clause, to secure a bond issue of \$40,000, and that was recorded on February 2, 1907. (Rec. p. 229.) It is unnecessary to notice the other encumbrances against the property of the Brewing Co. since, if the petitioner loses the tanks, they inevitably go to the satisfaction of the mortgage.

No money derived from or by the bonds went into the construction or equipment of the brewery, or into the purchase of the tanks. On May 11, 1908, because of the lack of funds on the part of the Brewing Co., the latter accepted the brewery in its then uncompleted condition, and made a settlement with Bollinger Bros. (Rec. pp. 67, 103, 113, 114, 123-126, 132), whereby the whole \$40,000 in bonds, together with certain stock, were issued to Bollinger Bros. in payment for the construction and partial equipment already performed and furnished. A deduction was made from the original contract price, by reason of the omission of Bollinger Bros. to furnish the tanks, etc., and the Brewing Co. was left to obtain the tanks as best it might. (Rec. pp. 113, 114, 123, 125, 128, 129, 230.)

On August 8, 1908, the petitioner contracted with the Brewing Co. to furnish the thirteen steel chip tanks now in controversy for the price of \$5,480, the contract containing the following clause (Rec. p. 108.):

"It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified, and any notes and acceptances that may be given on account of any such payments, shall have been fully paid; and in

case of default in any of said payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures."

On December 7, 1908, this contract was recorded, pursuant to the following statute of West Virginia (Code, W. Va. ch. 74, sec. 3):

* * * "And if any sale be made of goods and chattels, reserving the title until the same is paid for, or otherwise, and possession be delivered to the buyer, such reservation shall be void as to creditors of, and purchasers without notice from, such buyer, unless a notice of such reservation be recorded in the office of the clerk of the county court of the county where the property is." * * *

Under this contract your petitioner delivered and installed the tanks in August, 1908, and has been paid only \$1,000. Of the thirteen tanks, only seven were ever used in or about the operations of the brewery. (Rec. p. 171.)

The nature of these tanks and their relation to the brewery is fully described in the evidence. The function of chip tanks is to subject the beer to pressure and thereby "to give it life." (Rec. pp. 75, 148, 149.) Steel tanks of the type here involved have been employed in breweries since 1886, and are manufactured by at least one other concern than the petitioner. Other makes and types of chip tanks are manufactured by about a dozen other concerns. Many breweries still employ wooden chip tanks, and refuse to adopt steel tanks. (Rec. pp. 80, 154, 179.)

While in the event of the removal of the petitioner's tanks, some substitute would be necessary, such substitution could be easily effected. Other tanks could be obtained, or a carbonating system installed. (Rec. pp. 147, 148, 179,

183, 184.) A carbonating system would necessitate no change in the brewery except the elimination of the chip tanks. (Rec. p. 184.)

The tanks were completely manufactured at the petitioner's works in Detroit, Michigan, and shipped to the brewery, ready for installation. Nothing remained to be done, upon their arrival, except to convey them into the brewery, set them upon the iron stands hereinafter mentioned, attach the fittings and doors, and test the tanks. (Rec. p. 84.) They can be removed without injury to them, and can as well be used in any other brewery which employs chip tanks. (Rec. pp. 71, 72, 84, 85, 87, 142, 150, 154, 173.)

The tanks are circular steel receptacles of a special type, lined with enamel and constructed to resist pressure, eight feet in diameter, with a maximum height of ten and one-half feet. They are in no way attached to the land, the building, or any other part of the brewery, nor connected with any of the machinery, equipment or appliances. (Rec. pp. 71, 82, 84, 95, 163, 169, 171.) They rest on cast iron stands, on which the tanks are held in place by their own weight. (Rec. pp. 71, 75, 76, 81, 82, 84, 95, 168, 170, 171.) The stands themselves are not fastened to the floor or attached to the building, or any part thereof. (Rec. pp. 71, 84, 95, 168, 169, 171.) During their temporary periods of use, the beer is run into the tanks or withdrawn through an ordinary one and one-half inch rubber hose, attached by a coupling, similar to that used to connect a garden hose with a hydrant. (Rec. pp. 76, 77, 81, 85, 95, 115, 119, 131, 149, 152, 156, 168, 171, 172, 176, 178.)

When the brewery building was completed in April, 1906, in conformity with the plans (Rec. pp. 122, 140, 158),

and according to the usual custom (Rec. pp. 72, 73, 84, 89, 92, 114, 128, 140-142, 150), an archway was left in the wall for the entrance and exit of the tanks. (Rec. pp. 83, 84, 87, 114, 122, 123, 140, 141, 150, 152, 170.) From April, 1906, until after August, 1908, the archway stood open, though during this period the danger of the building's settling was the greatest and at the end of that period was practically terminated. (Rec. pp. 83, 126, 141, 162, 163.)

After the installation of the tanks, the arch was filled up with a brick wall surrounding a window, in accordance with the plans. (Rec. pp. 121, 141, 158, 163.) But this wall supports nothing, the imposed weight of the building being supported, not by the brick within the arch, but by the arch above the opening. (Rec. pp. 90, 164, 165.) The external appearance of the arch as closed up and as it now exists, is well displayed by two photographs and the plan thereof, shown at pages 158, 255 and 256 of the record.

The wall within this arch is in nowise interlocked with the surrounding wall (Rec. p. 163), and can be removed without the slightest injury to the building (Rec. pp. 85, 90, 92, 116, 141, 142, 164) and without injury to, or interference with, any of the interior arrangements or appliances of the brewery. (Rec. pp. 164, 167-169, 173-175.) The expense of tearing down and restoring this wall would not exceed \$50. (Rec. pp. 90-92, 142, 164-167, 169, 173.) The petitioner offered in its bill to pay the expense incident to the removal of the tanks and the restoration of the brewery to its previous condition.

On April 9, 1909, Bollinger Bros. and George W. Hartman, to whom Bollinger Bros. had on May 29, 1908, transferred some of the bonds, basing jurisdiction on diversity of citizenship, filed a bill in the Circuit Court for the Northern

District of West Virginia, praying the foreclosure of the mortgage and the appointment of a receiver. (Rec. p. 186.) A receiver was appointed, who took into his custody all the property of the Brewing Co., together with the tanks (Rec. p. 204), and a decree was entered directing the receiver to make sale of all of the property. including the tanks. (Rec. pp. 207, 218.)

To the foreclosure suit the petitioner was never joined as a party; and following the decree of sale in that suit, but before the sale was made, the petitioner filed its present ancillary bill, praying an injunction against the sale of the tanks under the foreclosure decree, and a recovery of said tanks or payment of the balance of the purchase price due thereon. (Rec. p. 2.) A motion for an injunction was made (Rec. p. 39) but never acted upon by the Circuit Court. Accordingly the receiver made sale of the brewery, including the tanks, for the sum of \$10,000 (Rec. pp. 215, 222), although the construction and equipment of the brewery had cost \$177,000 (Rec. p. 104); but the proceeds of the sale remain undistributed, pending the event of this suit. The purchasers at the foreclosure sale were three bond-holders and an associate, one Iams. (Rec. pp. 187, 217, 223.) Before the plant as a whole was offered for sale the tanks in question were offered separately. Although the original purchase price thereof had been \$5,480 as above mentioned, and the tanks were in perfectly good condition (Rec. pp. 168, 171), said Iams bid therefor only \$500. (Rec. p. 217.)

Bollinger Bros. and Hartman filed their answer herein, claiming a prior lien under the after-acquired property clause of the mortgage, over the reservation of title contained in the petitioner's contract of sale. (Rec. p. 42.) A replication being filed, proofs were taken. The Circuit

Court dismissed the petitioner's bill for want of equity, and this decree was affirmed by the Circuit Court of Appeals.

The Circuit Court (Dayton, District Judge) and the Circuit Court of Appeals (Pritchard, Circuit Judge, and Boyd and Rose, District Judges) held that the tanks had been installed by your petitioner as part of the brewery, with notice of the preexisting mortgage; that the tanks had been appropriated by your petitioner to the use of the brewery, and were necessary for its operation; that the tanks could not be removed without tearing down the brick wall within the arch; and that, therefore, the tanks became part of the realty, to which the mortgage attached, as a lien superior to and having priority over your petitioner's reservation of title. (Rec. p. 269, 195 Fed. 447.) A petition for rehearing was denied. But Pritchard, Circuit Judge, retracted his former opinion, and filed the following memorandum (Rec. p. 302:)

"I concurred in the opinion rendered in this case, but after a careful reading of the petition for rehearing and also the case of *Tippett and Wood v. Barham*, 180 Fed. p. 76, I am of the opinion that inasmuch as the vendor reserved a lien on the tanks in controversy for the purchase price, which was duly recorded in accordance with the laws of West Virginia, that the title never passed to the mortgagee under the after-acquired property clause but remained in the vendor. Therefore, I think a rehearing should be granted."

The petitioner submits that in its disposition of this case, the Circuit Court of Appeals erred in the following respects:

1. In holding that the mortgage with after-acquired property clause was effectual to create a lien on the tanks

installed by the petitioner after the execution of the mortgage, as against the title to, ownership of, and right to take possession of and remove said tanks, reserved to the petitioner in its contract with the Brewing Co.

2. In holding that the tanks, upon installation in the brewery, became part of the realty.

3. In not holding that the relative rights of the bondholders under the mortgage, on the one hand, and the petitioner, under its contract reserving title, on the other hand, were questions of local law.

4. In not holding that said relative rights were to be determined in accordance with the local law of West Virginia, as established by the decisions of the Supreme Court of Appeals thereof, announced prior to the making of the contract between the petitioner and the Brewing Co.

5. In not determining said relative rights in accordance with the decisions in *Hurxthall v. Hurxthall*, 45 W. Va. 584, *First Nat. Bank v. Hyer*, 46 W. Va. 13, and the principles announced in *Webster Lumber Co. v. Keystone Lumber Co.*, 45 W. Va. 545, and *Gartlan v. Hickman*, 56 W. Va. 75.

6. In not holding, if the decisions of this court were controlling, that the case fell with the line of decisions exemplified by *U. S. v. New Orleans R. R.*, 12 Wall. 362, and *Bear Lake Irr. Co. v. Garland*, 164 U. S. 1.

ARGUMENT

I.

THE PETITIONER'S TITLE TO THE TANKS MUST BE GOVERNED AND DETERMINED IN ACCORDANCE WITH THE LOCAL LAW OF WEST VIRGINIA, AS

EXPRESSED BY THE DECISIONS OF ITS SUPREME COURT AT THE TIME WHEN THE PETITIONER'S CONTRACT WAS MADE AND RIGHT OF ACTION ACCRUED.

The relative rights of the bondholders under the mortgage, on the one hand, and of the petitioner under its reservation of title, on the other hand, are to be determined by the decisions of the Supreme Court of Appeals of West Virginia rendered prior to the making of the contract of conditional sale, and the breach thereof, *Hurxthall v. Hurxthall*, 45 W. Va. 584, *First Nat. Bank v. Hyer*, 46 W. Va. 13, *Webster Lumber Co. v. Keystone Lumber Co.*, 51 W. Va. 545, and *Gartlan v. Hickman*, 56 W. Va. 75, which decisions are supported by the weight of authority in the country at large. The respondents will cite, as expressing "a modern and progressive doctrine," *Lazear v. Ohio Valley Co.*, 65 W. Va. 105, and certain decisions of this court. The Circuit Court of Appeals in deciding this case, rested its opinion directly on *Patton v. Moore*, 16 W. Va. 428, and *Trippett v. Barham*, 180 Fed. 76.

If the rulings of the federal courts are in any wise inconsistent with those of the Supreme Court of Appeals of West Virginia, the decisions of the latter court must govern, since every question involved in this case is one of local law.

What annexation of chattels makes them part of the realty is a question of local law.

New York Co. v. Allison, 107 Fed. 179.

Re Sunflower State Ref. Co. 195 Fed. 180.

The rights of the vendor of property under a reservation of title, are to be determined by the local law.

Bryant v. Swofford, U. S. 279.

Hewitt v. Berlin Machine Works, 194 U. S. 296.

Harkness v. Russell, 118 U. S. 663.

Hervey v. R. I. Locomotive Works, 93 U. S. 664.

Rights under and the validity of a mortgage on either real or personal property are questions of local law.

Abraham v. Casey, 179 U. S. 210.

Dodge v. Tulleys, 144 U. S. 451.

Etheridge v. Sperry, 139 U. S. 266.

The effect of a mortgage on after acquired property, is a question of local law.

Thompson v. Fairbanks, 196 U. S. 516.

Dooley v. Pease, 180 U. S. 126.

If it be true that *Patton v. Moore*, *supra*, is at variance with the *Hurxthall Case* and other later decisions, clearly *Patton v. Moore* must be taken to have been superseded. And if the *Lazear Case* conflicts with the previous decisions of the same court, it is also true that the *Lazear Case* was decided after this contract was made and the petitioner's right of action had accrued, and cannot affect the rights of the petitioner, who was entitled to rely on the law as expressed in the *Hurxthall Case* and other precedent decisions.

Kuhn v. Fairmont Coal Co., 215 U. S. 349, 357, 360.

Burgess v. Seligman, 107 U. S. 20, 33.

Great South. F. P. Hotel Co. v. Jones, 193 U. S. 532, 542.

Stanley Co. Com'rs v. Coler, 190 U. S. 437, 444, 445.

Loeb v. Columbia Tp., 179 U. S. 472.

II.

THE TANKS WERE PLACED IN THE BREWERY UNDER A VALID RESERVATION OF TITLE, WHICH, UNDER THE WEIGHT OF AUTHORITY AND THE LOCAL LAW OF WEST VIRGINIA WAS SUPERIOR TO

THE MORTGAGE, THOUGH THE LATTER WAS PRIOR IN POINT OF TIME. THE MORTGAGE COULD ATTACH TO THE TANKS ONLY SUBJECT TO SUCH CONDITIONS AS ACCOMPANIED THEM WHEN THEY CAME INTO THE POSSESSION OF THE BREWING CO.

It may as well be recognized at the outset, that the authorities touching this situation are in conflict, and that it is impossible to reconcile all of them, although some apparently contradictory decisions are reconcilable, if due consideration be given to the particular facts and to the relations of the parties involved. The rule adopted in West Virginia and supported by the weight of authority in the United States is shortly expressed in the following passage from a valuable note in 1 British Ruling Cases, 25 (Lawyers' Co-Op. Pub. Co.,) wherein are collected, discussed and distinguished many of the cases:

"In the United States the preponderance of authority is to the effect that where the removal of the fixture will not materially injure the premises, a seller thereof, retaining title thereto, may assert his right as against a prior mortgagee of the realty.

* * * The doctrine that where the fixture may be removed without material injury, the seller may enforce his lien as against the prior mortgagee of the realty, is applicable where the seller of the fixture has taken a chattel mortgage thereon."

Opposite to this doctrine is the so-called Massachusetts rule. That rule rests upon the principle that a mortgagee is entitled to improvements made on the real estate, during the continuance of the mortgage, and that he cannot be deprived of this right by the agreement or acts of the

mortgagor and a third party, entered into or done, without his consent.

Hunt v. Bay State Iron Co., 97 Mass. 279.

Southbridge Savings Bank v. Exeter Machine Works,
147 Mass. 542.

Hopewell Mills v. Taunton Savings Bank, 150 Mass.
519.

Meagher v. Hayes, 152 Mass. 228.

Fuller-Warren Co. v. Harter, 110 Wis. 80.

The law of West Virginia is not doubtful. In *Hurxthall v. Hurxthall*, 45 W. Va. 584, a mill and the land on which it stood, were covered by a deed of trust. The owner purchased necessary milling machinery and installed it in the mill, the vendor taking a deed of trust to secure payment of the purchase money. In a contest between the holder of the deed of trust on the real estate, and the vendor of the machinery, it was held that the deed of trust on the machinery was valid and effectual, as against the deed of trust on the real estate executed prior thereto, as its removal would not materially injure or impair the value of the real estate or buildings thereon; and that, if the detachment of the machinery would occasion some diminution in the value of the realty, as it would have stood, had the machinery never been installed, then such depreciation must be made whole, and the rights of the parties adjusted accordingly. In this decision the Supreme Court of Appeals distinctly allies itself with the majority doctrine above mentioned, following *Binkley v. Forkner*, 117 Ind. 176; *Campbell v. Roddy*, 41 N. J. Eq. 244; *Tift v. Horton*, 53 N. Y. 377; and *Eaves v. Estes*, 10 Kan. 314. the leading cases on this subject.

In *First National Bank v. Hyer*, 46 W. Va. 13, the same doctrine was recognized, as between a conditional ven-

dor of a boiler, engine and other sawmill machinery, and a prior mortgagee of the real estate, following *Hurxthall v. Hurxthall*.

In *Webster Lumber Company v. Keystone Lumber Company*, 51 W. Va. 545, it is laid down that parties may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon, the agreement of the parties superseding the law, and being binding alike upon the original parties, subsequent mortgagees and purchasers with notice.

In *Gartlan v. Hickman*, 56 W. Va. 75, it was held, quoting from *Edwards & B. Lumber Co. v. Rank*, 57 Neb. 323, and *Atchison etc. R. Co. v. Morgan*, 42 Kan. 23, that the chief test by which to determine whether an article is a fixture, is to enquire whether the party annexing it intended it to be a permanent accession to the freehold, and that before a chattel can be converted into a fixture by actual physical annexation, the intention of the parties and the uses to which it is put must combine to change its nature.

In *Patton v. Moore*, 16 W. Va. 428, cited by the Circuit Court of Appeals, the engine, boiler, burrs and mill irons were purchased by the owner of the land for use in the mill thereon. There was no reservation of title. No contract evidenced an intention to preserve them as personalty. The common ownership of both land and engine, boilers, burrs and mill irons marked the latter as part of the realty, since the common owner would have no motive, and had evinced no intention, to keep them separate. Hence it was held that they were not liable to levy under an execution as personal property. It is obvious that where an owner of land annexes a chattel to it by physical attachment, or brings upon it a chattel necessary for the use or enjoyment of a structure on

the land, such as a mill or factory, the presumption is strong that he intended the chattel as a permanent improvement of the realty. (*Tift v. Horton*, 53 N. Y. 377; *Winslow v. Merchants Ins. Co.*, 4 Metc. 306.)

Lazear v. Ohio Valley Steel Co., 65 W. Va. 105, will be cited as indicating a departure from the *Hurxthall Case*. As stated above, if this case varies the principles laid down by the *Hurxthall Case*, we are entitled to rely on the *Hurxthall Case* as a declaration of the law of this State, in force at the time our contract was made and our right of action accrued. (*Kuhn v. Fairmont Coal Co.*, 215 U. S. 349.) But the *Lazear Case*, when accurately read, shows no intention to depart from the *Hurxthall Case*, *Campbell v. Roddy*, *Binkley v. Forkner*, *Tift v. Horton*, and other like authorities. Citing these cases with approval, the court say, "In all the cases referred to, we have none like the case at bar, involving the contract of a special receiver." In the *Lazear Case* receivers' certificates were ordered issued and sold, in order to complete the plant, with the express provision that the holders of the certificates should have a first lien on the plant. The receiver, without authority, made purchases on credit, permitting the sellers to reserve title. It was correctly held that the sellers were affected with notice of the limitation of authority of the receivers, and that the unauthorized acts of the receivers could not divest the priority of the lien of the certificate holders. Despite some *dicta*, there is nothing more in this case.

The doctrine laid down in *Hurxthall v. Hurxthall* is well supported by the authorities.

In *Campbell v. Roddy*, 44 N. J. Eq. 244, there was a mortgage on an iron foundry and the land whereon it stood. The owner purchased machinery which was placed in the

foundry, the vendor of the machinery taking a chattel mortgage to secure the unpaid purchase money. It was held that while the real estate mortgage would have attached to the machinery had the chattel mortgage not been taken, yet the chattel mortgage, having been taken, was a valid lien on the machinery, having priority over the real estate mortgage; that the real estate mortgagee obtained no right to a lien upon anything but the property as it was conditioned at the time of the execution of such mortgage; that the equitable way of dealing with the property was to preserve the right of the prior real estate mortgage to the same degree of security which he would have enjoyed had the property remained as it was, when the real estate mortgage was executed; and that, as laid down in *United States v. New Orleans R. R.* 12 Wall. 362, and *Fosdick v. Schall*, 99 U. S. 235, the prior real estate mortgage could only attach itself to the machinery in the condition in which it came to the mortgagor's hands. This case has been followed by the New Jersey court in a recent decision: *Oil City Boiler Works v. N. J. Water & L. Co.*, 79 Atl. 451.

In *Tift v. Horton*, 53 N. Y. 337, the same doctrine was announced as between a prior real estate mortgagee and the holder of a chattel mortgage upon an engine and boiler used to operate an elevator. This case was lately followed in *Davis v. Bliss*, 187 N. Y. 77; *Bernheimer v. Adams*, 75 N. Y. Supp. 93, affirmed 175 N. Y. 472; *New York I. & I. Co. v. Cosgrove*, 62 N. Y. Supp. 372, affirmed, 167 N. Y. 601; and *Duffus & Howard Furnace Co.*, 40 N. Y. Supp. 925. *Tift v. Horton* has not been departed from, notwithstanding *McFadden v. Allen*, 134 N. Y. 489, which has been supposed to indicate a contrary tendency, but really went off on a question of equitable estoppel.

In *Binkley v. Forkner*, 117 Ind. 176, an engine, boiler, saws, shafting and other machinery were sold for use in a factory already covered by a real estate mortgage, the purchase money for the engine, boiler, etc., being secured by a chattel mortgage thereon. It was held that the chattel mortgage was entitled to priority. And the court laid down the doctrine, that where chattels are of such a character as to retain their identity and distinctive characteristics after the annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, or destroy or unnecessarily impair the value of the chattels, a chattel mortgage will preserve the personal character of the property, not only as between the parties, but as against a prior mortgagee of the real estate; that unless the detachment of the chattels would materially affect the security of the real estate mortgage by depreciating the value of the mortgaged property, or by dismantling it of an important fixture, *existing at the time the real estate mortgage was executed*, the precedent real estate mortgage only attaches to the interest which the mortgagor has in the chattels subsequently annexed, at the time of their annexation; and that if the detachment would occasion some diminution in the value, as it would have stood, had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case.

Eaves v. Estes, 10 Kan. 314, was a similar case, involving a steam engine for a mill. It was held that, regardless of the manner of attachment, the intention of the parties that the engine should retain the character of personal property, was evinced by the chattel mortgage thereon

and that the same did not become subject to the prior real estate mortgage on the mill.

In *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, the same principles were announced.

We have referred to the foregoing cases in detail, because, though expressly adopted as authorities by the Supreme Court of Appeals of West Virginia, they were quite as expressly repudiated by the Circuit Court of Appeals of the Fourth Circuit in *Tippett v. Barham*, 180 Fed. 76. The inappositeness of *Tippett v. Barham* in the decision of a West Virginia case at once becomes manifest.

The foregoing authorities, it is true, relate to the equities between real estate mortgagees and chattel mortgagees; but the same principles apply to real estate mortgagees and vendors of personal property annexed to the realty, where the vendor reserves title until the purchase money is paid.

In *First National Bank v. Hyer*, 46 W. Va. 13, it was recognized that the doctrine of *Hurxthall v. Hurxthall* was applicable to the case of a conditional vendor.

In *Wicks v. Island Park Ass'n*, 229 Pa. 400, the plaintiff sold to the defendant engines and fixtures for generating electric light and power, the contract reserving title in the seller until final payment was made. The machinery was bolted to a cement platform on the land of the defendant. At the time of its installation, the land was subject to a mortgage, with after-acquired property clause, to secure a bond issue. It was held that the seller of the machinery was entitled to recover it, in default of payment of the purchase price, as against the mortgagee.

In *Cox v. New Bern Light. & F. Co.*, 151 N. C. 648, there was a mortgage on the real estate, covering after-acquired property. Certain gas producing apparatus was installed and annexed to the plant, the vendor reserving title until the purchase money was paid. It was held that the vendor of the apparatus was entitled to retake the same, as against the precedent real estate mortgagee; that the real estate mortgage could attach to the apparatus only subject to those conditions which accompanied it into the possession of the purchaser; that it was immaterial that the vendor of the apparatus knew that it was to be annexed to the real estate, and that a notice of reservation of title was not recorded; that the real estate mortgagee was entitled to no more than a preservation of the property in the same state in which it was at the time of the execution of his mortgage.

In *Davis v. Bliss*, 187 N. Y. 77, a vendor's lien was reserved on real estate. Thereafter the purchaser of the real estate installed in the building on the premises an engine, placing the same upon a substantial foundation of cement and other materials, running an exhaust pipe from the engine room through the floor, ceiling and roof of the building, and connecting the engine by underground pipes with a gasoline tank outside the building, and by belts with the shafts in the mill. This engine was purchased under an agreement that title should remain in the seller thereof, until payment was made therefor; but on the other hand *the agreement for the sale of the real estate contained a clause providing that all machinery placed on the premises should become a part of the realty*. It was held, following *Tift v. Horton*, that notwithstanding this substantial manner of annexation, the vendor of the engine was entitled thereto and had the right to re-

cover damages against the vendor of the real estate for a conversion of the engine. This case is especially important, because some courts which are pledged to the so-called Massachusetts rule, have intimated, since the case of *McFadden v. Allen*, 134 N. Y. 489, that the New York courts have shown a tendency to depart from the decision in *Tiff v. Horton*. And see *Bernheimer v. Adams*, 75 N. Y. Supp. 93, affirmed 175 N. Y. 472; *Duffus v. Howard Furnace Co.*, 40 N. Y. Supp. 925.

In *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, there was a conditional sale of an electric generator built on piers and of a switch board attached by spikes to the side of a power house. It was held that the reservation of title was valid as against a prior real estate mortgage. And see, to the same effect, *Oil City Boiler Works v. N. J. Water & L. Co.*, (N. J.) 79 Atl. 451; *Daly v. New York, etc., R. Co.*, 55 N. J. Eq. 602.

In *Northwestern Mut. L. Ins. Co. v. George*, 77 Minn. 319, a building, subject to mortgage as part of the real estate, was constructed and used for cold storage purposes, the natural system of refrigeration being used. The mortgagor in possession purchased an artificial system of refrigeration, which was installed in the building, the vendor reserving title until payment was made. In installing the new apparatus, some of the apparatus of the old natural system was removed and some other minor changes were made in the building. All the new system could be removed, without material injury to the building or apparatus; but, upon such removal, the building could not be used for cold storage purposes, without putting in another artificial refrigeration system or restoring the old natural system. The latter could have been done at a cost of \$1,700 or \$1,800. It

did not appear that the removal of the present artificial system would have rendered the building worth any less for cold storage purposes than it would have been had the changes never been made. It was held that the apparatus, not having been paid for, did not become a part of the real estate, or subject to the prior mortgage thereon, but might be removed by the vendor, the court saying that the plaintiff was merely a mortgagee out of possession, and was never misled, and advanced no consideration on the strength of the machinery becoming a part of the realty; and that the apparatus did not become a part of the realty.

In *Harris v. Hackley*, 127 Mich. 46, a purchaser, who had contracted to buy real estate, purchased machinery, under an agreement that title should remain in the seller until paid for. The machinery was removed without damage to the remainder of the property. It was held that the machinery could not be withheld from the seller by the vendor of the realty, who by the terms of his contract was entitled in the event of a forfeiture, to a surrender of the property with all improvements, since, although such vendor stood in the position of an equitable mortgagee, he did not take his security on the faith of any appearance that the machinery was a part of the real estate.

In *Page v. Edwards*, 64 Vt. 124, it was held that machinery sold under a contract of conditional sale would retain its character of personalty against the holder of an existing mortgage on the real estate, notwithstanding that the machinery in place when the real estate mortgage was taken had been removed to make room for the machinery in question.

Authorities to the same effect might be multiplied indefinitely. Nor are such authorities to be found exclusively

in the state reports, as we shall show under the following heads.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR IS IN DIRECT CONFLICT WITH THE HOLDING OF THE CIRCUIT COURTS OF APPEALS OF THE THIRD AND EIGHTH CIRCUITS AND OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

In *Holly Mfg. Co. v. New Chester Water Co.*, 53 Fed. 192, 48 Fed. 879, title was reserved upon the pumping engine of a water works system, securely fastened to foundations situated on mortgaged real estate, the real estate mortgage containing an after-acquired property clause. It was held by the Circuit Court of Appeals of the Third Circuit, following *U. S. v. New Orleans R. R.* 12 Wall. 362, and distinguishing *Porter v. Pittsburg Steel Co.*, 122 U. S. 567, that the holder of the reservation of title ought to prevail. This holding is in harmony with that of the Supreme Court of Pennsylvania. *Wicks v. Island Park Assn.*, 229 Pa. 400.

In *Re Sunflower State Ref. Co.*, 195 Fed. 180, a conditional sale was made of certain machinery, known as a wax distillate, chilling press plant, refrigerator plant, filter press plant, pumping plant, generators, etc. This machinery was installed in a building designed by the vendor and built in accordance with its specification for the express purpose of receiving said machinery. The machinery was installed by the vendor and attached by means of bolts imbedded in the cement floor. The purchaser had therefore executed a mortgage with after-acquired property clause, which was duly recorded prior to the conditional sale. It was held by

the Circuit Court of Appeals of the Eighth Circuit, that the unpaid vendor was entitled to reclaim the property, as against the holders of the bonds secured by the prior mortgage, following in this respect *U. S. v. New Orleans R. R.*, *supra.*, *Fosdick v. Schall*, 99 U. S. 235, and *Myer v. Car Co.*, 102 U. S. 1, and distinguishing *Porter v. Pittsburg Steel Co.*, and other cases in this court. This decision is consistent with *Eaves v. Estes*, 10 Kan. 314.

J. L. Mott Iron Works v. Middle States, etc., Co., 17 App. 584, decided by the Court of Appeals of the District of Columbia, which is entitled, we suppose, to rank as a federal court, equal in dignity to a Circuit Court of Appeals, is to the same effect. There was a real estate mortgage containing an after-acquired property clause, subsequent to the execution of which steam radiators were placed in the building under a reservation of title. The radiators were connected with the steam pipes by means of valves which were screwed onto the pipes. Following *U. S. v. New Orleans R. R.*, and distinguishing *Porter v. Pittsburg Steel Co.*, the Court of Appeals held that the right of the vendor of the radiators was superior to that of the mortgagee.

Here then are three federal appellate courts ruling directly opposite to the court below in the present case.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

In *U. S. v. New Orleans R. R.*, 12 Wall. 326, it was distinctly held that a railroad mortgage, with after-acquired property clause, could not operate as against a subsequent seller of rolling stock, who had reserved title until the

payment of the purchase price, even though his contract was not recorded. The court, while upholding the validity of an after-acquired property clause, say:

"That doctrine is intended to subserve the purpose of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. *If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquired; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors.*"

In *Fosdick v. Schall*, 99 U. S. 239, a similar case, the court, following *U. S. New Orleans R. R.*, say:

"The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less."

These decisions have been approved and followed repeatedly:

Fosdick v. Southwestern Car Co., 99 U. S. 256.

Myer v. Western Car Co., 102 U. S. 1.

Bear Lake Irr. Co. v. Garland, 164 U. S. 1.

York Mfg. Co. v. Cassel, 201 U. S. 304.

In *Bear Lake Irr. Co. v. Garland*, 164 U. S. 1, there was a prior real estate mortgage, covering after-acquired property. After its execution a contractor constructed a number of miles of irrigation ditches, absolutely necessary to the works of the company, the vesting of the title to the lands on which the ditches were constructed being conditional upon the construction of the ditches. It was held that a lien claimed by the contractor for constructing these ditches was superior to the prior mortgage containing the after-acquired property clause. The court following *U. S. v. New Orleans R. R.*, and *Fosdick v. Schall*, laid down anew the proposition that a prior real estate mortgagee, though his mortgage contain an after-acquired property clause, has no right to after-acquired property, except subject to the liens or conditions which accompany the property at the time it is acquired by the mortgagor.

There is another and distinct class of cases in this court, which have been decided in favor of the prior mortgagee, and which appear to have been misunderstood by some of the inferior federal courts. In all of these cases there was involved the property of a quasi-public corporation, the preservation of the integrity of which, upon special grounds of public interest and necessity, has always been aided. Apt illustrations will readily occur, as in the assertion of jurisdiction to foreclose a mortgage covering a railroad situate in several states (*Muller v. Dows*, 94 U. S. 444), and the creation of the "six months rule." (Cf. *Wood v. Guarantee Trust Co.*, 128 U. S. 416; *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, and cases cited.) The distinction, while not frequently referred to, was expressly recognized in *Porter v. Pittsburg Steel Co.*, 122 U. S. 267. The court there say:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, *and to real estate not used for railroad purposes*, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles *which become annexed to and a part of the railroad* covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."

But a broader line of demarcation exists. In the cases in which the after-acquired property clause has been accorded superiority, the after-acquired property was of such character and was employed in such manner that it became an integral part of the mortgaged realty and lost its separate identity. And in almost every instance the reserved title or lien was attempted to be asserted, not against the after-acquired property in the form in which it was brought onto the mortgaged land, but against the after-acquired property in a new and distinct form, as a different entity, created by the very act of annexing it to, and merging it in, the land.

In every case, where the reservation of title or lien of the claimant accompanied into the possession of the mortgagor the identical, separate thing against which the reservation of title or lien was sought to be enforced, whether that thing was personalty (*U. S. v. New Orleans R. R.*, *Fosdick v. Schall*, *Fosdick v. Car Co.*, *Myer v. Car Co.*,) or whether it was real estate (*Bear Lake Irr. Co. v. Garland*), the reservation of title or lien has been sustained, as against the prior mortgagee.

In *Porter v. Pittsburg Steel Co.*, 122 U. S. 266, the property involved was railroad bridges, built on land owned by the railroad company, and the contracts for the construction of the bridges had provided that in case of non-payment therefor, the builders should have a right to remove the bridges and bridge materials. A prior mortgage, with after-acquired property clause, already covered the railroad. It was held that the mortgage was a first lien on the bridges. The decision went on the twofold ground that the railroad was a quasi-public corporation, and that the bridges became a part of the permanent structure of the railroad. It is apparent that the bridges were not brought upon the land, accompanied with a reservation of title, but were constructed on the incumbered land by means of materials furnished and labor performed. The bridges came into existence for the first time on the mortgaged land. They were new things created by the very fact and act of annexation to the realty, without which they would have had no existence at all. That they could have been removed from the land in their entirety was practically impossible. Removal could have been accomplished only by dismantling the structures, and this is best manifested by the fact that the contractors proceeded, not for the specific recovery of the bridges, but for a preferential payment of the contract price.

In *Toledo D. & B. R. Co. v. Hamilton*, 134 U. S. 296, the contractor claimed a lien for the construction of a dock on land to which the railroad company had a good equitable title, and which was covered by a pre-existing mortgage, with after-acquired property clause. The dock, of course, was not brought onto the land, accompanied with a lien in favor of the contractor. He furnished labor and materials, which were converted, by the very act of annexation to the

encumbered land, into the dock in question. Of this case and another it was said in *Bear Lake Irr. Co. v. Garland*, *supra*:

"In neither of the above mentioned cases did the title to the property come into the hands of the company burdened with any lien. * * * In the *Toledo Case* the dock was built upon property to which the mortgagor had a good equitable title and which was covered by the mortgage, just the same as if the title were a legal one, and it was held that the dock became subject to the lien of the mortgage as prior and superior to any lien of the mechanics for construction."

The remaining cases in this court relate to railroad tracks under varying states of facts. In *Dunham v. Cincinnati &c. R. Co.*, 1 Wall. 254, the contractor endeavored to assert a lien on an entire section of railroad constructed by him, under a contract providing that he was to keep possession and control of that section and its earnings until he had been fully paid. The roadbed was already subject to a mortgage, with after-acquired property clause, at the time he took possession of the section and performed his work.

In *Galveston &c. R. Co. v. Cowdrey*, 11 Wall. 459, rails already owned by the Company were pledged to Pulsford and afterwards used in the construction of the railroad, under an agreement that he should have a special lien on these rails. The railroad was already subject to mortgages, with after-acquired property clauses. The rails must have been incumbered with the mortgages at the time of the pledge to Pulsford. In a suit to foreclose the mortgages, he filed an intervening petition, claiming a lien, not on the rails, but on the section of road in the construction of which the rails were used. Assuming that the lien was claimed

merely against the rails, they had lost their separate identity as rails, upon which the lien had been reserved. They had been firmly fastened to the roadbed and by that annexation converted into a new thing, to-wit, a railroad track, which was an integral part of the realty. And the rails could not have been removed without utter destruction of the track. In *Bear Lake Irr. Co. v. Garland*, *supra*, this court distinguish the *Cowdrey Case*.

In *Dillon v. Barnard*, 21 Wall. 430, a contractor who built a section of railroad unsuccessfully endeavored to avail himself of a clause of a preexisting mortgage, relating to the creation of liens. He was relegated to such rights as he possessed under his contract with the railroad company, and stood as a mere general creditor.

In *Thompson v. White Water, etc., R. Co.*, 132 U. S. 68, the owner of a railroad subject to a mortgage with after-acquired property clause leased it, and the lessee under its agreement constructed a section of the railroad then remaining uncompleted. The lessee claimed a prior lien on the section of railroad thus constructed, but the mortgage was accorded priority.

In every one of the foregoing cases the claim adverse to the prior mortgage, growing out of the annexation of rails or other similar property, was asserted, with full recognition that the rails themselves had become merged in the realty as a permanent part of the railroad. The claim in every instance was not to a recovery of the rails, but to a prior charge against the section of railroad upon which the rails had been laid.

It may be conceded that from an ocular standpoint the merger with the realty and loss of identity is not quite so complete in the case of rails laid in a track, as in the case

of steel or concrete used in a bridge or dock, and that the local havoc wrought by pulling up the rails would be a little less than that of tearing down the bridge or dock to enable the vendor to carry away the materials. But this is merely to say that the facts of one case may carry it a little closer than another to the line separating that class of cases, embracing *U. S. v. New Orleans R. R.*, from the class embracing *Porter v. Pittsburg Steel Co.*, and *Toledo D. & B. R. Co. v. Hamilton*. However difficult it may be to classify the facts of a particular case, the line separating the two classes is existent and plain; and it is equally clear that the cases involving railroad tracks fall upon one side of the line and the case at bar falls upon the other side. It may be objected that the difference between the two classes of cases is only a difference of degree. But Mr. Justice Holmes once took occasion to state that there is, in the law, frequent recognition of differences of degree, and that they are none the worse for being such.

The error into which some of the lower federal courts have fallen, has been due, in a great measure, to a misunderstanding of the scope of the phrase "loose property," employed in *U. S. v. New Orleans R. R.* and *Porter v. Pittsburg Steel Co.* In the former case Mr. Justice Bradley says:

"Had the property sold by the government to the Railroad Co. been rails * * * or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the Railroad Co. itself, are unaffected by a prior general mortgage, given by the Company and paramount thereto."

And in *Porter v. Pittsburg Steel Co.*, Mr. Justice Blatchford says:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of the railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."

By the phrase "loose property" we think it clear that this court intended to do no more than to point out the distinction which it has enforced in all of its decisions, between property retaining a separate identity and susceptible of separate liens, on the one hand, and property physically merged with the real estate, on the other hand. Property is none the less loose because it does not embrace within itself a motive power of its own, as in the case of a locomotive, or perfect mobility, as in the case of a car.

In *Bear Lake Irr. Co. v. Garland*, *supra*, the subsequently acquired property was in no literal sense loose; but the identity was preserved and the prior mortgagee was defeated in this court.

Within the correct sense of the term "loose property" we submit that the tanks now in controversy were loose property. Though the court below adverted to the size of the tanks, and said that their gravity was sufficient to hold

them in place without fastening, this observation might with equal force be made of an eight gallon keg, a table or a chair. The matter of size and weight is, after all, one of comparison, bearing relation to the mechanical means at hand for the purpose of removal. A modern locomotive could be moved easily with a crane, though it might afford some difficulty to a man with a wheelbarrow. But it is not supposed that this would afford an obstacle to the application of the holding in *U. S. v. New Orleans R. R.*, in case the locomotive were furnished under a car trust agreement.

In *Holly Mfg. Co. v. New Chester Water Co.*, 53 Fed. 19, affirming 48 Fed. 879, the pumping engines, though firmly affixed to the realty, were held to be "loose property" within *U. S. v. New Orleans R. R.*, rather than within *Porter v. Pittsburg Steel Co.*; so with the wax making machinery in *Re Sunflower State Ref. Co.*, 195 Fed. 108; the radiators in *J. L. Mott Iron Works v. Middle States, etc., Co.*, 17 App. D. C. 584; the gas apparatus in *Cox v. New Bern Light & F. Co.*, 151 N. C. 648; the refrigerating apparatus in *Northwestern Mut. L. Ins. Co. v. George*, 77 Minn. 319; and the iron foundry equipment in *Campbell v. Roddy*, 44 N. J. Eq. 244.

The case of *Tippett v. Barham*, 180 Fed. 76, we think to have been decided correctly, on reasoning marvelously incorrect; for the water-works stand-pipe in question fell within *Porter v. Pittsburg Steel Co.* But candor requires us to say that we think that in *Phoenix Iron Works Co. v. N. Y. S. & T. Co.*, 83 Fed. 757, and *Evans v. Kister*, 92 Fed. 836, so much relied on in *Tippett v. Barham*, the power house machinery was "loose property," and that those cases were incorrectly decided, unless they can be sustained as involving quasi-public property.

V.

THE VIEW THAT THE PETITIONER IS PRECLUDED FROM ASSERTING ITS TITLE TO THE TANKS, BECAUSE THE TANKS ARE NECESSARY TO THE OPERATION OF THE BREWERY, IS WITHOUT MERIT, EITHER IN LAW OR FACT.

It was argued by the appellees in the court below, with some evident success, that by the removal of the tanks, the operation of the brewery would be prevented,—that the brewery would cease to be a brewery and its integrity would be destroyed.

The necessity for these tanks was a necessity arising not out of their peculiar character or relation to the brewery; but a necessity, if such it may be termed, arising out of the fact that the Brewing Co. had been enabled under its contract with the petitioner to obtain possession thereof, and, if the contractual obligations were enforced, would be compelled to pay for the tanks, or to purchase and pay for a substitute.

The argument on the other side reduces itself, in the last analysis, to the proposition that the purchaser of machinery, under a contract of conditional sale, is entitled to retain it in any event; that the inability or unwillingness to pay for machinery already purchased entitles a purchaser to keep it, without paying for it, if the machinery is requisite for the operation of a manufacturing plant. If such a contention were sound, then it is apparent that all of the cases on the subject have been wrongly decided; for in all of the cases which we have cited, the removal of the machinery would likewise have reduced the plant to idleness, until a substitute was obtained.

The truth is that the contention involves the erroneous assumption, that the prior mortgagee of the real estate is entitled to a continuance of the real estate in the condition in which it is after the annexation of the chattel; whereas the authorities show that he is entitled to no more than a preservation of the security as it was at the time when the mortgage was taken. If the removal of the fixture involves any material injury to the real estate, the prior mortgagee is entitled to equitable compensation for such injury, but he can have no higher right to the fixture itself than the purchaser thereof acquired.

In *Hurxthall v. Hurxthall*, 45 W. Va. 584, the milling machinery was quite as necessary to the mill as are the tanks to the brewery in the case at bar, and yet it was never intimated that because the removal of the machinery would reduce the mill to idleness, the chattel mortgagee lost his right. On the contrary, the court say, quoting from *Binkley v. Forkner*:

"A chattel mortgage is effectual to preserve the character of the chattels mortgaged, as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate or the buildings thereon. If the detachment would occasion some diminution in the value of the realty *as it would have stood had the attachment not been made*, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case."

In *Campbell v. Roddy*, 44 N. J. Eq. 244, the machinery in question was quite as necessary to the operation of the

foundry as are the tanks to the brewery. But the court say:

"The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession but he obtained no right by the terms of his mortgage, to a lien upon anything *but the property as it was conditioned at the time of its execution*. He could not compel the mortgagor to add anything to it. So long, therefore, as he is secured the full amount of the indemnity *which he took*, he has no ground for complaint. There is, therefore, no inequity towards the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, in protecting the lien of the latter to its full extent, so far as it will not diminish the original security of the former. As already remarked the real estate mortgagee is entitled to any annexation made by the mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made annexation, was an equity of redemption. So far as this interest had a value, it became subject to the lien of the prior real estate mortgagee, but the value of his interest was the value of the property subject to the lien."

Then citing with approval *U. S. v. New Orleans R. R.*, and *Fosdick v. Schall*, the court continue:

"Or in my view the equitable way of dealing with property is to preserve the right of the prior real estate mortgagee to the same degree of security which he would have enjoyed had the property remained as when mortgaged."

In *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, the court expressly considered the point that the removal of the refrigerating apparatus, to which title had been reserved by the seller, would render the plant worthless for cold storage purposes, unless new machinery was substituted, or the old natural system restored at a cost of \$1,700 to \$1,800; but this was held not to militate against the right of the seller, although the refrigerating apparatus in question had been substituted for a system in existence at the time when the mortgage was executed.

In *Cox v. New Bern Light. & F. Co.*, 151 N. C. 648, a similar contention was ruled in the same way, though the gas apparatus on which title was reserved, was placed on the mortgaged premises in lieu of apparatus in existence at the time when the mortgage was given, and the latter apparatus was dismantled and its value destroyed. The court held that the mortgagee was entitled to no more than a preservation of the value of the premises, as they were at the time the mortgage was executed, and that it did not appear that, by the removal of the old apparatus, the value was diminished.

In the case at bar, the facts are undisputed, that the removal of the tanks would not diminish the value of the mortgage security, as it existed at the time when the mortgage was executed.

That, at the foreclosure sale, one of the bondholders bid but \$500 for the tanks, \$4,000 for the brewery without the tanks, and \$10,000 for the brewery with the tanks, is not impressive. No one is likely to be deceived by a bid of \$10,000 for a brewery which cost \$177,000 before the tanks

were purchased, or by a bid of \$500 for tanks as good as new, for which the manufacturer's price was \$5,480, or by the pretense that the loss of tanks, worth \$500, would depreciate the property to the extent of \$6,000.

Nor does the Massachusetts rule establish the integrity theory, countenanced by the Circuit Court of Appeals. We need, perhaps, go no further than *Hunt v. Bay State Iron Co.*, 97 Mass. 283, where a reservation of title to rails, used in the construction of a railroad, was held valid, as between the parties, though not as against a prior mortgagee or a subsequent purchaser or mortgagee for value, without notice. And to the same effect are *Southbridge Savings Bank v. Exter Machine Works*, 127 Mass. 542, and *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519.

But the case of *Lorain Steel Co. v. Norfolk & B. St. R. Co.*, 187 Mass. 50, is a complete refutation of the notion that the Massachusetts doctrine is founded on or supports this integrity theory. Under a contract reserving title, until the purchase price was paid, there was a sale of certain street railway rails, trucks, motors and motor equipment. When the contract was entered into, and the rails delivered, it was understood that they were to be used in the construction of a track for the railway company, and, say the court, "an assent to such use by the vendor is implied from the very nature of the undertaking." The track was laid in the public streets. The railway company mortgaged its property to the American Loan & Trust Company, which was ignorant of the conditional contract. After foreclosure of this mortgage, the vendor of the rails, etc., brought an action of trover against the purchaser at the foreclosure sale, and the latter claimed that there was such annexation

of the rails to the soil, as converted them into realty, for which an action of trover would not lie. It was held by the Supreme Judicial Court that the case did not fall within the doctrine announced in *Hunt v. Bay State Iron Co.*, and other like cases, for the reason that in the case then at bar the railway company had no easement or freehold interest in the public streets. And so the conditional vendor was held entitled to recover damages for the conversion of the rails, as well as the residue of the equipment which had been furnished by it. It must be apparent that if the Massachusetts rule rested on the integrity theory, the conditional vendor must have failed; for the right of the conditional vendor to recover the rails and equipment furnished by it, or damages in lieu thereof, tended as greatly to the destruction of the street railway system, as if the railway company had been seized in fee simple of the street.

The Massachusetts rule that a mortgagee cannot be affected by an agreement made or acts done by the mortgagor and a third party, is based upon the doctrine as to the nature and effect of a mortgage, prevalent in Massachusetts. In that state the mortgagee is the holder of the legal title to the mortgaged land, and is entitled to enter and take possession, even before condition broken, in like manner as in England at common law.

Bradley v. Fuller, 23 Pick. 9.

Winslow v. Merchants Ins. Co., 4 Metc. 306.

Butler v. Page, 7 Metc. 40.

Page v. Robinson, 10 Cush. 99.

Hapgood v. Blood, 11 Gray, 400.

Clary v. Owen, 15 Gray, 522.

Norcross v. Norcross, 105 Mass. 265.

And it logically follows from the conception that the mortgagee is the legal owner of the premises, and is entitled to possession thereof, that the mortgagor in possession can neither himself remove, nor authorize a third party to remove, an improvement made, during the continuance of the mortgage. An attentive reading of the Massachusetts decisions, above cited, will show this to be the basis of the rule originated in that state, in regard to fixtures, where the rights of a mortgagee come in question.

But the doctrine which obtains in West Virginia in regard to deeds of trust, the use of a mortgage having become practically obsolete, is entirely different. Under the deed of trust, the trustee is regarded as holding the legal title for the benefit of both debtor and creditor. Neither the trustee nor the creditor is entitled to possession, before default, even in those cases wherein no express provision is made for the retention of possession by the debtor.

Swann v. Young, 36 W. Va. 57.

In the case at bar, though we have referred to the security of the bondholders as a mortgage, it was in fact a deed of trust.

We do not undertake to say that the reason for the Massachusetts rule as to the right of the mortgagee to chattels annexed to the real estate, during the continuance of the mortgage, has always been recognized in the states which have adopted that rule. We are free to confess that the Massachusetts rule has been adopted in some states, where the common law rights of a mortgagee, accorded to him in Massachusetts, are denied; and that, on the contrary, the Massachusetts rule has been rejected in some jurisdic-

tions, where the common law rights of a mortgagee are upheld. But, at all events, the reason of the Massachusetts rule is manifest, and that reason, if regarded, must preclude the adoption of that rule in West Virginia, even if such cases as *Hurxthall v. Hurxthall* and *First Nat. Bank v. Hyer*, can be laid aside.

Respectfully submitted,

GEORGE M. HOFFHEIMER,
ORLA B. TAYLOR,
CHARLES N. KIMBALL,
WALTER S. SUGDEN,

Counsel for Petitioner.

MAR 26 1914
JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 368.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,
vs.
SISTERSVILLE BREWING COMPANY, et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.

BRIEF FOR PETITIONER.

ORLA B. TAYLOR,
CHARLES N. KIMBALL,
WALTER S. SUGDEN,
GEORGE M. HOFFHEIMER,
Counsel for Petitioner.

TABLE OF CASES CITED.

—A—

Abraham vs. Casey, 179 U. S., 210.....	18
Anderson vs. Creamery Pack. Mfg. Co., 8 Idaho, 200	25, 26
Andrews vs. Chandler, 27 Ill. App., 103.....	26
Atchison, etc., R. Co. vs. Morgan, 42 Kan., 23.....	23

—B—

Baldwin vs. Young, 47 La. Ann., 1466.....	25, 34
Bear Lake Irr. Co. vs. Garland, 164 U. S., 1.....	
.....11, 41, 44, 49, 51, 54, 58, 69	
Bernheimer vs. Adams, 75 N. Y. Supp., 93, 175 N. Y., 472	28, 32
Binkley vs. Forkner, 117 Ind., 176.....	
.....22, 24, 26, 28, 45, 54, 59	
Blanchard vs. Eureka Plan. Mill Co., 58 Ore., 37....	33
Botsford vs. New Haven, M. & W. R. Co., 41 Conn., 454	69
Bradley vs. Fuller, 23 Pick., 9.....	36
Bryant vs. Swofford, 214 U. S., 279.....	18
Burgess vs. Seligman, 107 U. S., 20.....	19
Butler vs. Page, 7 Mete., 40.....	36
Buell vs. Cummings, 61 Vt., 213.....	26

—C—

Campbell vs. Roddy, 44 N. J. Eq., 244.....	
.....22, 24, 27, 45, 54, 55, 59	
Central Trust Co. vs. Marietta, etc., R. Co., 48 Fed., 865	69
Clary vs. Owen, 15 Gray, 522.....	27, 36
Cochran vs. Flint, 57 N. H., 514.....	25

II

	PAGES
Condit vs. Goodwin, 95 N. Y. Supp., 1122, affg. 89	
N. Y. Supp., 827.....	26
Cox vs. New Bern Light & F. Co., 151 N. C., 648....	
.....	26, 30, 52, 55, 61, 69
Crippen vs. Morrison, 13 Mich., 23.....	26

—D—

Daly vs. New York, etc., R. Co., 55 N. J. Eq., 602 ..	32
Davenport vs. Schantz, 43 Vt., 546.....	26
Davis vs. Bliss, 187 N. Y., 77.....	28, 30, 69
Defiance Mach. Works vs. Trisler, 21 Mo. App., 69	69
Dillon vs. Barnard, 21 Wall., 430.....	49
Dodge vs. Tulleys, 144 U. S., 451.....	18
Dooley vs. Pease, 180 U. S., 126.....	18
Duffus vs. Howard Furnace Co., 40 N. Y. Supp.,	
925	26, 28, 32
Dunham vs. Cincinnati, etc., R. Co., 1 Wall., 254....	48

—E—

Eaves vs. Estes, 10 Kan., 314.....	22, 29, 43
Edwards & B. Lumber Co. vs. Rank, 57 Neb., 323....	
.....	23, 29
Ellison vs. Salem Coal & Min. Co., 43 Ill. App.,	
120	26
Etheridge vs. Sperry, 139 U. S., 266.....	18
Evans vs. Kister, 92 Fed., 836.....	52, 69

—F—

Farmers L. & T. Co. vs. Denver & R. G. Co., 126	
Fed., 49	69
First Nat. Bank vs. Elmore, 52 Ia., 541.....	26
First Nat. Bank vs. Hyer, 46 W. Va., 13.11, 17, 22, 30, 38	

III

PAGES

Fosdick vs. Schall, 99 U. S., 235.....	
.....	28, 41, 44, 51, 58, 60, 69
Fosdick vs. Southwestern Car Co., 99 U. S., 256.....	
.....	41, 42, 44, 51, 58, 69
Frankland vs. Moulton, 5 Wis., 1.....	27
Fred W. Wolf Co. vs. Herman Savings Bank, 168	
Mo. App., 549.....	33, 45, 55, 60
Fuller-Warren Co. vs. Harter, 110 Wis., 80.....	20, 27, 35

—G—

Galveston, etc., R. Co. vs. Cowdrey, 11 Wall, 459.....	
.....	47, 48, 49
Gartlan vs. Hickman, 56 W. Va., 75.....	11, 17, 28
General Electric vs. Transit Equipment Co., 57 N.	
J. Eq., 460.....	25, 32, 48, 55
German Sav. & L. Soc. vs. Weber, 16 Wash., 95....	26
Great South. F. P. Hotel Co. vs. Jones, 193 U. S.,	
532	19
Gregg vs. Metropolitan Trust Co., 197 U. S., 183....	43

—H—

Harris vs. Hackley, 127 Mich., 46.....	34, 58, 69
Harris vs. Youngstown Bridge Co., 90 Fed., 328....	50, 67
Hapgood vs. Blood, 11 Gray, 40.....	36
Harkness vs. Russell, 118 U. S., 663.....	18
Hawkins vs. Hersey, 86 Me., 394.....	27
Hervey vs. R. I. Locomotive Works, 93 U. S., 664..	18
Hewitt vs. Berlin Mach. Works, 194 U. S., 296.....	18
Holly Mfg. Co. vs. New Chester Water Co., 53 Fed.,	
192, 48 Fed., 879.....	26, 42, 55, 56, 69
Holt vs. Crucible Steel Co., 224 U. S., 264.....	18
Hopewell Mills vs. Taunton Sav. Bank, 150 Mass.,	
519	20, 35, 62, 63

IV

	PAGES
Hunt vs. Bay State Iron Co., 87 Mass., 279.....	20, 27, 35, 37, 62
Hurxthall vs. Hurxthall, 45 W. Va., 584.....	11, 18, 19, 21, 22, 24, 26, 38, 59

—J—

J. L. Mott Iron Works vs. Middle States, etc., Const. Co., 17 App. D. C., 584.....	25, 55, 69
---	------------

—K—

Kuhn vs. Fairmont Coal Co., 215 U. S., 349.....	19, 24
---	--------

—L—

Langdon vs. Buchanan, 62 N. H., 657.....	25
Lazear vs. Ohio Valley S. F. Co., 65 W. Va., 105.....	17, 18, 19, 24
Leibowitz vs. Thomson Real Estate Co., 143 N. Y. Supp., 802	28, 32
Loeb vs. Columbia Tp., 179 U. S., 472.....	19
Lorain Steel Co. vs. Norfolk & B. S. T. R. Co., 187 Mass., 50	27, 36, 62

—M—

McFadden vs. Allen, 134 N. Y., 489.....	28, 32
Maguire vs. Park, 140 Mass., 21.....	27
Meagher vs. Hayes, 152 Mass., 228.....	35
Muller vs. Dows, 94 U. S., 444.....	43
Myer vs. Western Car Co., 102 U. S., 1.....	41, 42, 44, 51, 58, 69

—N—

PAGES

New Chester Water vs. Holly Mfg. Co.....	26, 42, 55, 56, 69
New York I. & I. Co. vs. Cosgrove, 62 N. Y. Supp., 372, 167 N. Y., 101.....	28
New York L. Ins. Co. vs. Allison, 107 Fed., 179....	18
Nicholas vs. Potts, 71 N. Y. Supp., 765.....	26
Norcross vs. Norcross, 105 Mass., 265.....	36
Northwestern Mut. L. Ins. Co. vs. George, 77 Minn., 319.....	25, 32, 55, 60

—O—

Oil City Boiler Works vs. N. J. Water & L. Co., 81 N. J. Law, 491.....	28, 32
---	--------

—P—

Padgett vs. Cleveland, 33 S. C., 339.....	26
Page vs. Edwards, 64 Vt., 124.....	26, 34
Page vs. Robinson, 10 Cush., 99.....	36
Paine vs. McDowell, 71 Vt., 28.....	26
Patton vs. Moore, 16 W. Va., 428.....	17, 18, 23
Phoenix Iron Works Co. vs. N. Y. S. & T. Co., 83 Fed., 757	52
Pierce vs. Emery, 32 N. H., 484.....	27
Porter vs. Pittsburgh Steel Co., 122 U. S., 567.....	42, 43, 46, 50, 51, 53, 54, 55, 56

—S—

Schumacher vs. Edward P. Allis Co., 70 Ill. App., 556	25
Southbridge Sav. Bank vs. Exeter Machine Works, 147 Mass., 542.....	20, 35

VI

	PAGES
Stanley Co. Com'rs. vs. Coler, 190 U. S., 437.....	19
Sunflower State Ref. Co., Re., 195 Fed., 180.....	18, 42, 55
Swann vs. Young, 36 W. Va., 57.....	38

—T—

Thompson vs. Fairbanks, 196 U. S., 516.....	18
Thompson vs. White Water, etc., R. Co., 132 U. S., 68	49
Tift vs. Horton, 53 N. Y., 377.....	22, 24, 26, 28, 32
Tilford vs. Atlantic Match Co., 134 Fed., 927.....	69
Tippett vs. Barnham, 180 Fed., 76.....	9, 17, 30, 51, 52, 70
Toledo, D. & B. R. Co. vs. Hamilton, 134 U. S., 296	47, 48, 50, 51

—U—

Union Trust Co. vs. Southern Sawmills Co., 166 Fed., 193	52
U. S. vs. New Orleans R. R., 12 Wall., 362.....	11,
28, 40, 41, 42, 44, 50, 51, 53, 55, 56, 58, 60, 66, 68, 69	

—W—

Warren vs. Liddell, 110 Ala., 232.....	25
Watertown Steam Engine Co. vs. Davis, 4 Houst., 192	27
Webster Lumber Co. vs. Keystone Lumber Co., 51 W. Va., 545.....	11, 17, 22
Wicks vs. Island Park Assn., 229 Pa., 400.....	30, 42, 55, 69
Williamson vs. New Jersey South R. Co., 28 N. J. Eq., 277, 29 N. J. Eq., 311.....	69
Winslow vs. Merchants Ins. Co., 4 Metc., 306.....	24, 36
Wolford vs. Baxter, 33 Minn., 12.....	58, 63

VII

	PAGES
Wood vs. Guarantee Trust Co., 128 U. S., 416.....	43
Wood vs. Holly Mfg. Co., 100 Ala., 325.....	25, 69

—Y—

York Mfg. Co. vs. Cassell, 201 U. S., 304.....	41
--	----

INDEX.

AFTER-ACQUIRED PROPERTY CLAUSE—

Conditions accompanying property paramount	30-32, 40-43, 53-57, 66-69
Analysis of federal cases.....	40-52
Cases where clause subordinate.....	40-43
Cases where clause accorded priority.....	43-52
Distinction between cases.....	43-46
Application to cases.....	43-52
Separateness of identity the test.....	44-46, 54-57
"Loose property," what is 53-57; and see 40-53	
Merged property	44-52
Quasi-public property	43, 44, 52
Local law governs	18
Record of reservation of title unnecessary as	
against	66-69
Enforced to subserve justice and not injustice	40, 66-69

ASSIGNMENTS OF ERROR.....	10-16
---------------------------	-------

BREWERY—

Construction of	2, 3
Cost of	2, 3, 5
Tanks (See "Statement;" "Tanks").	

VIII

BREWERY Co.—	PAGES
Brewery constructed	2, 3
Bond issue	2, 71, 72
Bonds, how applied.....	2, 3, 71, 72
Conditional purchase of tanks.....	3, 4
Debt for tanks.....	3, 4
Foreclosure suit against.....	4, 5
Mortgage of	2, 71, 72

CHATTEL MORTGAGE (See "Conditional Sale").

CIRCUIT COURT—	
Answer	5
Bill	4
Decree	1, 9
Errors of	11-16
Evidence	6-9
Evidence summarized	8, 9
Injunction, motion for.....	4, 5
Opinion of	9
Proceedings in	4-9
Hartman vs. Brewing Co.....	4, 5

CIRCUIT COURT OF APPEALS, 4TH CIRCUIT—

Conflict with:

Circuit Courts of Appeals.....	
.....42, 43, 50-52, 55-57, 67, 69	
Supreme Court of U. S....40-42, 53, 54, 66, 67, 69	
Supreme Court of W. Va.....10, 11, 21-24	
Weight of authority.....25-35, 69	
Errors of	10, 11
Opinion of	9, 71, 72
Pritchard, J., on rehearing.....	9
(See "Federal Courts, conditional sales in.")	

CONDITIONAL SALE—		PAGES
Chattel mortgage, doctrine the same.....	22, 30	
Contract of	3, 4	
Local law governs.....	18	
Prior real estate mortgage, relation to:		
In Circuit Courts of Appeals.....		
.....	42, 50-52, 55-57, 67	
In Supreme Court, U. S.....		
.....	40-42, 53, 54, 66, 67, 69	
In Supreme Court, W. Va.....	10, 11, 21, 24	
Weight of authority.....	25-35, 69	
Massachusetts rule.....	20, 27, 35-38, 62, 63	
After-acquired property clause, effect of.		
(See "After-acquired property clause.")		
Recording:		
Unnecessary as against prior mortgage....	66-68	
West Virginia statute.....	3	
(See "After-Acquired property clause;"		
"Federal Courts, conditional sales		
in;" "Statement;" "Tanks.")		
Removal of chattel conditionally sold:		
Real estate mortgagee entitled only to se-		
curity as at time mortgage executed		
.....	2, 27-29, 58-61	
Compensation to mortgagee where injury		
results	22, 28, 29, 59, 60	
No injury in case at bar.....	6-9	
ERRORS—		
Of Circuit Court of Appeals.....	10, 11	
FEDERAL COURTS, conditional sales in:		
Circuit Court of Appeals....	42, 43, 50-52, 55-57, 67, 69	
Supreme Court, U. S.....	40-42, 53, 54, 66, 67, 69	
Cases distinguished (See "After - acquired		
property clause").		

X

	i
HARTMAN VS. BREWING CO.—	PAGES
Proceedings in	4, 5
Sale of tanks in.....	5, 61, 62
IDENTITY, separateness of, a test.....	44-46
(See "Merged Property;" "Loose Property.")	
INTEGRITY THEORY—	
Analysis of	57-65
Authorities do not support.....	56-65
Massachusetts rule does not support.....	62, 63
LOCAL LAW—	
Annexation, a question of.....	18
Binding herein	17-19
Changes in, not binding.....	18, 19
Conditional sale, a question of.....	18
Ignored by lower courts.....	10, 11
Mortgage, a question of.....	18
Recording statute	3
LOOSE PROPERTY, 53-57; and see.....	40-52
(See "Identity;" "Merged Property.")	
MASSACHUSETTS—	
Rule	20, 27, 35-38
Basis of rule.....	36-38, 62, 63
Integrity theory not supported by.....	62, 63
Not applicable in West Virginia.....	38, 39
MERGED PROPERTY	44-52
NECESSITY OF CHATTEL.....	57-65
(See "Integrity Theory.")	
QUASI-PUBLIC PROPERTY.....	43, 44, 52
REAL ESTATE MORTGAGE—	
After-acquired property clause (See After-	
Acquired Property Clause").	

PAGES

Relation to subsequent chattel mortgage (See "Conditional Sale").	
Relation to subsequent conditional sale (See "Conditional Sale").	
Security at time of execution, entitled to only	22, 27-29, 58-61
Massachusetts view of.....	36-38
West Virginia, obsolete in.....	38, 39
West Virginia, trust deed used.....	38, 39
(See "Brewing Co.")	

RECORDING STATUTE—

Prior mortgagee not entitled to protection of..	66-69
Of West Virginia.....	3

RESERVATION OF TITLE (See "Conditional Sale")—

STATE COURTS, conditional sales in:

Weight of authority.....	19, 20, 25-35
Indiana	28
Kansas	29, 42, 43
Louisiana	34
Massachusetts	20, 27, 35-38
Michigan	20
Minnesota	32
Missouri	33
Nebraska	29
New Jersey	27, 32
New York	28, 31, 32
North Carolina	30
Oregon	33
Pennsylvania	30, 42
Vermont	34
West Virginia (See "West Virginia").	
Wisconsin	35

XII

STATEMENT—

	PAGES
Brewery, construction of.....	2
Bond issue	2
Circuit Court, proceedings in.....	5-7
Errors of	11-16
Circuit Court of Appeals, proceedings in.....	7, 8
Errors of	10, 11
Conditional sale of tanks.....	3, 4
Mortgage of Brewery Co.....	2
Executed	2
Foreclosed	4, 5
Tanks, conditional sale of.....	3, 4
Description of	3-5
Loose property	29-31
Relation to brewery.....	3-5
Sale in foreclosure suit.....	4, 5

TANKS—

Annexation of, none.....	6-9
Bond issue proceeds not applied to.....	2, 3
Conditional sale of.....	3, 4
Cost of removal	8, 9
Delivery of	4, 6
Function of	6, 7
Indebtedness for	3, 4
Installation of	4, 6
Necessity of	6, 9
Relation to brewery	6-9
Removal of, practicability and effect.....	6-9
Sale in Hartman Case.....	4, 5, 61, 62
Substitutes for	6, 9

WEST VIRGINIA—

Conditional vendor, relation to real estate mortgagee	17, 21-24, 59
---	---------------

XIII

	PAGES
Decisions, stated	17, 19, 20, 59
Weight of authority followed by.....	17, 21-24
Federal Courts bound by.....	17-19
Local law:	
Decisions	17, 19, 20, 21-24
Federal Courts bound by.....	17-19
Recording statute	3
Mortgage, common law, not used.....	38, 39
Deed of trust used.....	38, 39
Massachusetts doctrine not applicable.....	38, 39
Mortgagee, chattel, relation to real estate mortgagee	17, 19, 20, 21-24
Mortgagee, real estate, relation to chattel mortgagee	17, 19, 20, 21-24, 59
Mortgagee, real estate, relation to condition vendor	17, 19, 20, 21-24, 59
Recording statute:	
Prior mortgagee not entitled to protec- tion of	66-69
Quoted	3
Removal of chattel conditionally sold.....	22, 59

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 368.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,

vs.

SISTERSVILLE BREWING COMPANY, et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.

BRIEF FOR PETITIONER.

Statement.

This cause comes up on writ of *certiorari* to review a judgment of the Circuit Court of Appeals for the Fourth Circuit, affirming a decree of the Circuit Court for the Northern District of West Virginia, dismissing for want of equity a bill filed in the latter court by the petitioner. The matter involved is the title to thirteen steel chip tanks, furnished and installed by the petitioner, under the contract hereinafter mentioned, in the brewery of the Sistersville Brewing Co., at Sistersville, West Virginia.

Bollinger Bros. contracted with the Brewing Co. to furnish the plans and specifications for, and to construct and equip, a complete brewery for the latter at Sistersville. Bollinger Bros. performed this contract, except the furnishing and installation of one ice machine, the steel chip tanks, "and a few other small things." (Rec., pp. 102, 111, 112, 113, 114.)

The building was completed in April, 1906; but the equipment and machinery were installed later. (Rec., pp. 149, 150.)

Pending the construction of the brewery, on December 1, 1906, the Brewing Co. executed a deed of trust in the nature of a mortgage (hereinafter referred to as a mortgage), to John S. Sell, trustee, covering all of its property, with an after-acquired property clause, to secure a bond issue of \$40,000, and that was recorded on February 2, 1907. (Rec., p. 214.) It is unnecessary to notice the other encumbrances against the property of the Brewing Co. since, if the petitioner loses the tanks, they inevitably go to the satisfaction of the mortgage.

No money derived from or by the bonds went into the construction or equipment of the brewery, or into the purchase of the tanks. On May 11, 1908, because of the lack of funds on the part of the Brewing Co., the latter accepted the brewery in its then uncompleted condition, and made a settlement with Bollinger Bros., whereby the whole \$40,000 in bonds, together with \$50,000 par value of stock, estimated at ninety cents on the dollar, were issued to Bollinger Bros. in payment for the construction and partial equipment already performed and furnished. (Rec., pp. 58, 94, 102, 103, 112, 115, 122.)

For the ice machine, chip tanks and other things which Bollinger Bros. had failed to supply, the Brewing Co. was allowed, in this settlement, a deduction of \$10,000, it being agreed that Bollinger Bros. would furnish the omitted articles if, within one year, the Brewing Co. would raise and pay the \$10,000. But, upon learning thereafter that the Brewing Co. had no ready cash, Bollinger Bros. later refused to furnish the tanks, and put the petitioner and the Brewing Co. into direct communication with each other. (Rec., pp. 100, 101, 102, 103, 113.)

On August 8, 1908, the petitioner contracted with the Brewing Co. to furnish the thirteen steel chip tanks now in controversy for the price of \$5,480, the contract (Rec., pp. 95-99) containing the following clause (Rec. p. 98) :

"It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified, and any notes and acceptances that may be given on account of any such payments, shall have been fully paid; and in case of default in any of said payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures."

On December 7, 1908, this contract was recorded pursuant to the following statute of West Virginia (Code, W. Va., ch. 74, sec. 3) :

* * * "And if any sale be made of goods and chattels, reserving the title until the same is paid for, or otherwise, and possession be delivered

to the buyer, such reservation shall be void as to creditors of, and purchasers without notice from, such buyer, unless a notice of such reservation be recorded in the office of the clerk of the county court of the county where the property is." * * *

Under this contract the petitioner delivered and installed the tanks in August, 1908, and has been paid only \$1,000, the balance being evidenced by unpaid notes of the Brewing Co., dated December 1, 1908, for the aggregate principal sum of \$4,531.15, payable ninety days after date, with interest. (Rec., pp. 84, 85, 90, 91, 93.)

On April 9, 1909, Bollinger Bros. and George W. Hartman, to whom Bollinger Bros. had on May 29, 1908, transferred some of the bonds, basing jurisdiction on diversity of citizenship, filed a bill in the Circuit Court for the Northern District of West Virginia, praying the foreclosure of the mortgage and the appointment of a receiver. (Rec., p. 175.) A receiver was appointed, who took into his custody all the property of the Brewing Co., together with the tanks (Rec., p. 191), and a decree was entered directing the receiver to make sale of all of the property, including the tanks. (Rec., pp. 194, 195.)

To the foreclosure suit the petitioner was never joined as a party; and following the decree of sale in that suit, but before the sale was made, the petitioner filed its present ancillary bill, praying an injunction against the sale of the tanks under the foreclosure decree, and a recovery of said tanks or payment of the balance of the purchase price due thereon. (Rec., p. 2.) A motion for an injunction was made (Rec., pp. 33,

34), but never acted on by the Circuit Court. Accordingly the receiver made sale of the brewery, including the tanks, for \$10,000 (Rec., pp. 201-203, 208), although the construction and equipment of the brewery had cost \$177,000 (Rec., p. 94), but the proceeds of the sale remain undistributed, pending the event of this suit. (Rec., pp. 207-208.) The purchasers at the foreclosure sale were three bondholders and an associate, one Iams. (Rec., pp. 102, 176, 203, 208.) Before the plant as a whole was offered for sale, the tanks in question were offered separately. Although the original purchase price thereof had been \$5,480 as above mentioned, and the tanks were in perfectly good condition (Rec., pp. 157, 159), said Iams bid therefor only \$500. (Rec., p. 203.)

Bollinger Bros. and Hartman filed their answer herein, claiming a prior lien under the after-acquired property clause of the mortgage, over the reservation of title contained in the petitioner's contract of sale. (Rec., p. 37). They alleged that the tanks had been sold and installed by the petitioner, with notice of the mortgage; that said tanks had been permanently annexed to the realty, were an essential part of the brewery, and could not be removed without injuring and impairing the value of the real estate and buildings; and that Hartman had no connection with the promotion, construction or equipment of said brewery, but had received his bonds from Bollinger Bros. in the summer of 1908, in payment for certain real estate, at which time he knew nothing of the necessity for purchasing any further material, fixtures or appliances on credit.

A replication being filed, proofs were taken. In the evidence there was no material conflict. In so far

as it referred to the nature of the tanks and their relation to the brewery, it was in substance as follows:

The function of chip tanks is to subject the beer to pressure and thereby "to give it life." (Rec., pp. 66, 120, 137, 138, 143, 172.) Steel tanks of the type here involved have been employed in breweries since 1886, and are manufactured by at least one other concern than the petitioner. Other makes and types of chip tanks are manufactured by about a dozen other concerns. Many breweries still employ wooden chip tanks, and refuse to adopt steel tanks. (Rec., pp. 71, 143, 144, 145, 168, 169.)

While in the event of the removal of the petitioner's tanks, some substitute would be necessary, such substitution could be easily effected. Other tanks could be obtained, or a carbonating system installed. (Rec., pp. 131, 137, 168, 171, 173.) A carbonating system would necessitate no change in the brewery except the elimination of the chip tanks. (Rec., p. 173.)

The tanks were completely manufactured at the petitioner's works in Detroit, Michigan, and shipped to the brewery, ready for installation, under the contract in question. Nothing remained to be done, upon their arrival, except to convey them into the brewery, set them upon the iron stands hereinafter mentioned, attach the fittings and doors, and test the tanks. (Rec., pp. 62, 75.) They can be removed without injury to them, and can as well be used in any other brewery which employs chip tanks. (Rec., pp. 62, 63, 76, 78, 131, 137, 139, 162.)

The tanks are circular steel receptacles of a special type, lined with enamel and constructed to resist pres-

sure, eight feet in diameter, with a maximum height of ten and one-half feet. They are in no way attached to the land, the building, or any other part of the brewery, nor connected with any of the machinery, equipment or appliances. (Rec., pp. 63, 72, 75, 86, 156, 158, 159.) They rest on cast iron stands, on which the tanks are held in place by their own weight. (Rec., pp. 62, 63, 66, 67, 72, 75, 86, 156, 158, 159.) The stands themselves are not fastened to the floor or attached to the building or any part thereof. (Rec., pp. 63, 75, 158, 159.) During their temporary periods of use, the beer is run into the tanks or withdrawn through an ordinary one and one-half inch rubber hose, attached by a coupling, similar to that used to connect a garden hose with a hydrant. (Rec., pp. 68, 72, 76, 86, 120, 141, 145, 146, 156, 160-162, 164, 167, 168.)

When the brewery building was completed in April, 1906, in conformity with the plans (Rec., pp. 111, 129, 130, 146 a, 150) and according to the usual custom (Rec., pp. 63, 64, 75, 80-82, 103, 117, 129-131, 162), an archway was left in the wall for the entrance and exit of the tanks. (Rec., pp. 74, 75, 111, 112, 139, 150, 158.) From April, 1906, until after August, 1908, the archway stood open, though during this period the danger of the building's settling was the greatest and at the end of that period was practically terminated. (Rec., pp. 74, 115, 131, 150, 151.)

After the installation of the tanks, the arch was filled up with a brick wall surrounding a window, in accordance with the plans. (Rec., pp. 112, 130, 150, 151.) But this wall supports nothing, the imposed weight of the building being supported, not by the brick within the arch, but by the arch above the opening. (Rec., p. 152.) The external appearance of the arch as

closed up and as it now exists, is well displayed by the plan and two photographs thereof, shown at pages 146 and 234 of the record.

The wall within this arch is in nowise interlocked with the surrounding wall (Rec., pp. 111, 130, 151), and can be removed without the slightest injury to the building (Rec., pp. 76, 83, 130, 131, 132, 152, 153), and without injury to, or interference with, any of the interior arrangements or appliances of the brewery. (Rec., pp. 152, 154-157, 159, 161-163.) The expense of tearing down and restoring this wall would not exceed \$50. (Rec., pp. 81, 83, 131, 132, 152, 153.) The petitioner offered in its bill to pay the expense incident to the removal of the tanks and the restoration of the brewery to its previous condition.

Of the thirteen tanks, only seven were used in or about the operations of the brewery. (Rec., p. 159.)

Summarizing the evidence, therefore, it is established: (1) that the petitioner and the Brewing Co., by the express terms of their above mentioned contract, evinced an intention to preserve the status of the tanks as chattels, and to prevent their annexation to the realty; (2) that the tanks were not adapted peculiarly to the purposes of this particular brewery; (3) that there was no physical annexation of the tanks to the realty; (4) that the separate identity and physical separateness of the tanks were preserved; (5) that the removal of the tanks would be accompanied with no injury to the tanks; (6) that no injury to the brewery or its other equipment would result from or be incident to the removal of the tanks, such removal requiring only the taking down of a brick wall within an arch-

way, which was planned and constructed for the very purpose of permitting the entry and exit of chip tanks; (7) that the removal and restoration of this brick wall would in nowise injure the brewery or any of its equipment, and the cost thereof would not exceed \$50; (8) that six of the thirteen tanks were never used by the Brewing Co.; (9) that, in the event of the removal of the tanks, a substitute would be necessary, in order that the Brewing Co. might produce marketable beer; and (10) that the Brewing Co. could readily obtain a substitute elsewhere, if it paid for the same.

The Circuit Court dismissed the petitioner's bill for want of equity, and this decree was affirmed by the Circuit Court of Appeals.

The Circuit Court (Dayton, District Judge) and the Circuit Court of Appeals (Pritchard, Circuit Judge, and Boyd and Rose, District Judges) held that the tanks had been installed by your petitioner as part of the brewery, with notice of the pre-existing mortgage; that the tanks had been appropriated by your petitioner to the use of the brewery, and were necessary for its operation; that the tanks could not be removed without tearing down the brick wall within the arch; and that, therefore, the tanks became part of the realty, to which the mortgage attached, as a lien superior to and having priority over your petitioner's reservation of title. (Rec., p. 244; 195 Fed., 447.) A petition for rehearing was denied. But Pritchard, Circuit Judge, retracted his former opinion, and filed the following memorandum (Rec., pp. 265; 195 Fed., 1023, 1024):

"I concurred in the opinion rendered in this case, but after a careful reading of the petition for rehearing and also the case of *Tippett and Wood*

vs. Barham, 180 Fed., p. 76, I am of the opinion that inasmuch as the vendor reserved a lien on the tanks in controversy for the purchase price, which was duly recorded in accordance with the laws of West Virginia, that the title never passed to the mortgagee under the after-acquired property clause but remained in the vendor. Therefore, I think a rehearing should be granted."

Assignments of Error.

We include in this brief, in deference to the requirement of the rule, the assignments of error against the decree of the Circuit Court. But as both the Circuit Court and the Circuit Court of Appeals ignored all questions of jurisdiction and procedure in the Hartman case, and based their decisions upon their views of the relative rights of the petitioner and the bond holders, by virtue of the reservation of title and right of possession in the contract between the petitioner and the Brewing Co., and the after-acquired property clause in the mortgage, the substantive questions presented to this court are more succinctly stated in the brief in support of the petition for the writ of *certiorari*, as follows:

"The petitioner submits that in its disposition of this case, the Circuit Court of Appeals erred in the following respects:

1. In holding that the mortgage with after-acquired property clause was effectual to create a lien on the tanks installed by the petitioner after

the execution of the mortgage, as against the title to, ownership of, and right to take possession of and remove said tanks, reserved to the petitioner in its contract with the Brewing Co.

2. In holding that the tanks, upon installation in the brewery, became part of the realty.

3. In not holding that the relative rights of the bondholders under the mortgage, on the one hand, and the petitioner, under its contract reserving title, on the other hand, were questions of local law.

4. In not holding that said relative rights were to be determined in accordance with the local law of West Virginia, as established by the decisions of the Supreme Court of Appeals thereof, announced prior to the making of the contract between the petitioner and the Brewing Co.

5. In not determining said relative rights in accordance with the decisions in *Hurxthall vs. Hurxthall*, 45 W. Va., 584; *First Nat. Bank vs. Hyer*, 46 W. Va., 13, and the principles announced in *Webster Lumber Co. vs. Keystone Lumber Co.*, 51 W. Va., 545, and *Garthan vs. Hickman*, 56 W. Va., 75.

6. In not holding, if the decisions of this court were controlling, that the case fell with the line of decisions exemplified by *U. S. vs. New Orleans R. R.*, 12 Wall., 362, and *Bear Lake Irr. Co. vs. Garland*, 164 U. S., 1."

The assignments of error are as follows (Rec., pp. 237-240) :

"1. The Circuit Court of the United States for the Northern District of West Virginia erred

in making and entering the decree in favor of the defendants and against the plaintiff, made and entered on the 17th day of October, 1911.

2. Said Circuit Court erred in refusing the relief prayed by the plaintiff's bill, and in dismissing said bill.

3. Said Circuit Court erred in not holding that, under the contract set forth in the record, title to and ownership of the tanks and fixtures in controversy, remained in the plaintiff, the contract price not having been paid.

4. Said Circuit Court erred in not holding that, under the contract set forth in the record, title to and ownership of the tanks and fixtures in controversy, remained in said plaintiff, until the contract price therefor was paid, and that, said contract price not having been paid and default having been made in the payment thereof, said plaintiff had and has the right to take possession of and remove said tanks and fixtures, subject to the payment by the plaintiff of the cost of re-opening, for said removal, and of closing, after said removal, the archway constructed in the brewery for the entrance of said tanks and fixtures.

5. Said Circuit Court erred in holding that the reservation to the plaintiff, in the contract set forth in the record, of title to and ownership of the tanks and fixtures in controversy, until the payment of the contract price, and of the right, in case of default in such payment, to take possession of and remove the same, was void as against the mortgages or deeds of trust executed by, and the judgments recovered and executions issued against, said Brewing Company.

6. Said Circuit Court erred in holding that the mortgages or deeds of trust executed by, and the judgments recovered and executions issued against, Sistersville Brewing Company, were liens on the tanks and fixtures in controversy, having priority over the title to, ownership of, and right to take possession of and remove said tanks and fixtures, reserved to said plaintiff in the contract set forth in the record.

7. Said Circuit Court erred in holding that the provisions of the mortgages or deeds of trust executed by Sistersville Brewing Company to John S. Sell, Trustee, and Abijah Hays, Trustee, respectively, purporting to convey or create a lien on after acquired property, were effectual to convey or create a lien on the tanks and fixtures, furnished and installed in the brewery by the plaintiff, after the execution of said mortgages or deeds of trust, as against the title to, ownership of, and right to take possession of and remove the same, reserved to said plaintiff in the contract set forth in the record.

8. Said Circuit Court erred in holding that the tanks and fixtures in controversy, upon installation in the brewery, became part of the real estate.

9. Said Circuit Court erred in holding that the tanks and fixtures in controversy were so annexed to the real estate as to become subject to the liens of the mortgages or deeds of trust executed by, and judgments recovered and executions issued against, Sistersville Brewing Company, notwithstanding the reservation to the plaintiff of the title to, ownership of, and right to take possession of and remove said tanks and fixtures, in the contract set forth in the record.

10. Said Circuit Court erred in holding that the tanks and fixtures in controversy, were essential to the integrity and operation of said brewery, and, therefore, subject to the liens of the mortgages or deeds of trust executed by, and judgments recovered and executions issued against, Sistersville Brewing Company, notwithstanding the reservation to the plaintiff of the title to, ownership of, and right to take possession of and remove said tanks and fixtures, in the contract set forth in the record.

11. Said Circuit Court erred in not holding that the mortgages or deeds of trust executed by, and judgments recovered against, Sistersville Brewing Company prior to the installation of the tanks and fixtures in controversy, could not become liens on said tanks and fixtures, except subject to the title to, ownership of, and right to take possession of and remove the same, reserved by the plaintiff in its contract with said Brewing Company, the plaintiff to pay the cost of reopening, for said removal, and of closing, after said removal, the archway constructed in the brewery, for the entrance of said tanks and fixtures.

12. Said Circuit Court erred in holding that it had jurisdiction of the suit of George W. Hartman *et al.* against Sistersville Brewing Company *et al.*

13. Said Circuit Court erred in not holding that the proceedings, orders and decrees in the suit of George W. Hartman *et al.* against Sistersville Brewing Company *et al.* were without jurisdiction and void, as to and against Detroit Steel Cooperage Company.

14. Said Circuit Court erred in holding that it had jurisdiction of the suit of George W. Hartman *et al.* against Sistersville Brewing Company *et al.*, although John S. Sell, trustee, to whom was executed the mortgage or deed of trust sought to be foreclosed in said suit was not joined as a party, and said John S. Sell, trustee, and the plaintiffs in said suit, were, at the time of the commencement thereof, residents and citizens of the State of Pennsylvania.

15. Said Circuit Court erred in holding that Detroit Steel Cooperage Company, which was not joined as a party to the suit of George W. Hartman *et al.* against Sistersville Brewing Company *et al.*, was not an indispensable party to said suit.

16. Said Circuit Court erred in holding that it had jurisdiction in the suit of George W. Hartman *et al.* against Sistersville Brewing Company *et al.*, to decree a sale of the tanks and fixtures in controversy, title to and ownership of said tanks and fixtures, until the payment of the contract price, and the right, in case of default in such payment, to take possession of and remove said fixtures, having been reserved to said Detroit Steel Cooperage Company in the contract set forth in the record.

17. Said Circuit Court erred in not awarding an injunction, enjoining and restraining the receiver appointed in the suit of George W. Hartman *et al.* against Sistersville Brewing Company *et al.* from selling the tanks and fixtures in controversy, title to and ownership of, which tanks and fixtures,

until the payment of the contract price, and the right, in case of default in such payment, to take possession of and remove said tanks and fixtures, having been reserved by Detroit Steel Cooperage Company in and by the contract set forth in the record.

18. If the sale of the tanks and fixtures in controversy, by the receiver appointed in the suit of George W. Hartman *et al.* against Sistersville Brewing Company *et al.*, pending the suit of Detroit Steel Cooperage Company against Sistersville Brewing Company *et al.*, was valid, then the Circuit Court erred in not decreeing that said Detroit Steel Cooperage Company be paid out of the proceeds of said sale, the amount of the notes held by said Detroit Steel Cooperage Company for the unpaid contract price of said tanks and fixtures."

ARGUMENT.**I.**

THE PETITIONER'S TITLE TO THE TANKS MUST BE GOVERNED AND DETERMINED IN ACCORDANCE WITH THE LOCAL LAW OF WEST VIRGINIA, AS EXPRESSED BY THE DECISIONS OF ITS SUPREME COURT AT THE TIME WHEN THE PETITIONER'S CONTRACT WAS MADE AND RIGHT OF ACTION ACCRUED.

The relative rights of the bondholders under the mortgage, on the one hand, and of the petitioner under its reservation of title, on the other hand, are to be determined by the decisions of the Supreme Court of Appeals of West Virginia rendered prior to the making of the contract of conditional sale, and the breach thereof (*Hurxthall vs. Hurxthall*, 45 W. Va., 584, decided in 1898; *First Nat. Bank vs. Hyer*, 46 W. Va., 13, decided in 1899; *Webster Lumber Co. vs. Keystone Lumber Co.*, 51 W. Va., 545, decided in 1902; and *Gartlan vs. Hickman*, 56 W. Va., 75, decided in 1904), which decisions are supported by the weight of authority in the country at large. The respondents will cite, as expressing "a modern and progressive doctrine," *Lazear vs. Ohio Valley Co.*, 65 W. Va., 105, decided in 1909, and certain decisions of this court. The Circuit Court of Appeals in deciding this case, rested its opinion directly on *Patton vs. Moore*, 16 W. Va., 428, and *Tippett vs. Barham*, 180 Fed., 76.

If the rulings of the federal courts are in any wise inconsistent with those of the Supreme Court of Ap-

peals of West Virginia, the decisions of the latter court must govern, since every question involved in this case is one of local law.

What annexation of chattels makes them part of the realty is a question of local law.

New York L. Ins. Co. vs. Allison, 107 Fed., 179.
Re Sunflower State Ref. Co., 195 Fed., 180.

The rights of the vendor of property under a reservation of title, are to be determined by the local law.

Bryant vs. Swofford, 214 U. S., 279.
Hewitt vs. Berlin Machine Works, 194 U. S., 296.
Harkness vs. Russell, 118 U. S., 663.
Hervey vs. R. I. Locomotive Works, 93 U. S., 664.

Rights under and the validity of a mortgage on either real or personal property are questions of local law.

Abraham vs. Casey, 179 U. S., 210.
Dodge vs. Tulleys, 144 U. S., 451.
Etheridge vs. Sperry, 139 U. S., 266.
Holt vs. Crucible Steel Co., 224 U. S., 264.

The effect of a mortgage on after acquired property, is a question of local law.

Thompson vs. Fairbanks, 196 U. S., 516.
Dooley vs. Pease, 180 U. S., 126.

If it be true that *Patton vs. Moore*, *supra*, is at variance with the *Hurxthall Case* and other later decisions, clearly *Patton vs. Moore* must be taken to have been superseded. And if the *Lazear Case* conflicts with

the previous decisions of the same court, it is also true that the *Lazear Case* was decided after this contract was made and the petitioner's right of action had accrued, and cannot affect the rights of the petitioner, who was entitled to rely on the law as expressed in the *Hurthall Case* and other precedent decisions.

Kuhn vs. Fairmont Coal Co., 215 U. S., 349, 357, 360.

Burgess vs. Seligman, 107 U. S., 20, 33.

Great South. F. P. Hotel Co. vs. Jones, 193 U. S., 532, 542.

Stanley Co. Com'rs vs. Coler, 190 U. S., 437, 444, 445.

Loeb vs. Columbia Tp., 179 U. S., 472.

II.

THE TANKS WERE PLACED IN THE BREWERY UNDER A VALID RESERVATION OF TITLE, WHICH WAS SUPERIOR TO THE MORTGAGE, THOUGH THE LATTER WAS PRIOR IN POINT OF TIME. THE MORTGAGE COULD ATTACH TO THE TANKS ONLY SUBJECT TO SUCH CONDITIONS AS ACCOMPANIED THEM INTO THE POSSESSION OF THE BREWING CO.

It may as well be recognized at the outset, that the authorities touching this situation are in conflict, and that it is impossible to reconcile all of them, although some apparently contradictory decisions are reconcilable, if due consideration be given to the particular facts and to the relations of the parties involved. The rule supported by the weight of authority in the United States is shortly expressed in the following passage from

a valuable note in 1 British Ruling Cases, 25 (Lawyers' Co-Op. Pub. Co.), wherein are collected, discussed and distinguished many of the cases:

"In the United States the preponderance of authority is to the effect that where the removal of the fixture will not materially injure the premises, a seller thereof, retaining title thereto, may assert his right as against a prior mortgagee of the realty. * * * The doctrine that where the fixture may be removed without material injury, the seller may enforce his lien as against the prior mortgagee of the realty, is applicable where the seller of the fixture has taken a chattel mortgage thereon."

This rule is based upon the principle that the real estate mortgagee is deprived of nothing, by way of security, which he had or was entitled to, at the time when he took the mortgage, and that it is equitable that the intention expressed in the contract of conditional sale or chattel mortgage should be enforced.

Opposite to this doctrine is the so-called Massachusetts rule. It is held that the real estate mortgagee is entitled to the benefit of all accessions to the realty, and that he cannot be deprived of this right by any act of, or agreement between, a conditional vendor and vendee, or chattel mortgagor and mortgagee, to which he was not a party and has not given his assent. This rule, prevalent in Massachusetts, has been adopted in some other states. (*Hunt vs. Bay State Iron Co.*, 97 Mass., 279; *Southbridge Savings Bank vs. Exeter Machine Works*, 127 Mass., 542; *Hopewell Mills vs. Taunton Savings Bank*, 150 Mass., 519; *Fuller-Warren Co. vs. Harter*, 110 Wis., 80.)

The local law of West Virginia is not doubtful. It is the rule supported by the weight of authority, above stated. It is in accord with the decisions of at least two circuit courts of appeals and with the decisions of this court. It fully sustains the contention of the petitioner that the reservation of title under which the tanks were placed in the brewery was superior to the mortgage, though the latter was prior in point of time; and that the mortgage could attach to the tanks only subject to the conditions which accompanied them when they came into the possession of the Brewing Co.

Consideration of this subject appropriately falls under three heads:

- A. The local law of West Virginia;
- B. The decisions of the state courts; and,
- C. The decisions of the federal courts.

A.

THE LOCAL LAW OF WEST VIRGINIA.

In *Hurxthall vs. Hurxthall*, 45 W. Va., 584, decided in 1898, a mill and the land on which it stood, were covered by a deed of trust. The owner purchased necessary milling machinery and installed it in the mill, the vendor taking a deed of trust to secure payment of the purchase money. In a contest between the holder of the deed of trust on the real estate, and the vendor of the machinery, it was held that the deed of trust on the machinery was valid and effectual, as against the

deed of trust on the real estate executed prior thereto, as its removal would not materially injure or impair the value of the real estate or buildings thereon; and that, if the detachment of the machinery would occasion some diminution in the value of the realty, *as it would have stood, had the machinery never been installed*, then such depreciation must be made whole, and the rights of the parties adjusted accordingly. In this decision the Supreme Court of Appeals distinctly allies itself with the majority doctrine above mentioned, following *Binkley vs. Forkner*, 117 Ind., 176; *Campbell vs. Roddy*, 44 N. J. Eq., 244; *Tift vs. Horton*, 53 N. Y., 377; and *Eaves vs. Estes*, 10 Kan., 314, the leading cases on this subject. Quoting *Binkley vs. Forkner, supra*, the court said:

“A chattel mortgage is effectual to preserve the character of the chattels mortgaged, as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate or the buildings thereon. If the detachment would occasion some diminution in the value of the realty as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case.”

In *First National Bank vs. Hyer*, 46 W. Va., 13, decided in 1899, the same doctrine was recognized, as between a conditional vendor of a boiler, engine and other sawmill machinery, and a prior mortgagee of the real estate, following *Hurxthall vs. Hurxthall*.

In *Webster Lumber Company vs. Keystone Lumber Company*, 51 W. Va., 545, decided in 1902, it is laid

down that parties may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon, the agreement of the parties superseding the law, and being binding alike upon the original parties, subsequent mortgagees and purchasers with notice.

In *Gartlan vs. Hickman*, 56 W. Va., 75, decided in 1904, it was held, quoting from *Edwards & B. Lumber Co. vs. Rank*, 57 Neb., 323, and *Atchison, etc., R. Co. vs. Morgan*, 42 Kan., 23, that the chief test by which to determine whether an article is a fixture, is to inquire whether the party annexing it intended it to be a permanent accession to the freehold, and that before a chattel can be converted into a fixture by actual physical annexation, the intention of the parties and the uses to which it is put must combine to change its nature.

In *Patton vs. Moore*, 16 W. Va., 428, cited by the Circuit Court of Appeals, the engine, boiler, burrs and mill irons were purchased by the owner of the land for use in the mill thereon. There was no reservation of title. No contract evidenced an intention to preserve them as personalty. The common ownership of both land and engine, boilers, burrs and mill irons marked the latter as part of the realty, since the common owner would have no motive, and had evinced no intention, to keep them separate. Hence it was held that they were not liable to levy under an execution as personal property. It is obvious that where an owner of land annexes a chattel to it by physical attachment, or brings upon it a chattel necessary for the use or enjoyment of a structure on the land, such as a mill or factory, the presumption is strong that he intended the chattel

as a permanent improvement of the realty. (*Tift vs. Horton*, 53 N. Y., 377; *Winslow vs. Merchants Ins. Co.*, 4 Metc., 306.)

Lazear vs. Ohio Valley Steel Co., 65 W. Va., 105, decided in 1909, will be cited as indicating a departure from the *Hurxthall Case*. As stated above, if this case varies the principles laid down by the *Hurxthall Case*, the petitioner is entitled to rely on the *Hurxthall Case* as a declaration of the law of this State, in force at the time its contract was made and its right of action accrued. (*Kuhn vs. Fairmont Coal Co.*, 215 U. S., 349, and other authorities, *supra*.) But the *Lazear Case*, when accurately read, shows no intention to depart from the *Hurxthall Case*, *Campbell vs. Roddy*, *Binkley vs. Forkner*, *Tift vs. Horton*, and other like authorities. Citing these cases with approval, the court say, "In all the cases referred to, we have none like the case at bar, involving the contract of a special receiver." In the *Lazear Case* receivers' certificates were ordered issued and sold, in order to complete the plant, with the express provision that the holders of the certificates should have a first lien on the plant. The receiver, without authority, made purchases on credit, permitting the sellers to reserve title. It was correctly held that the sellers were affected with notice of the limitation of authority of the receiver, and that the unauthorized acts of the receivers could not divest the priority of the lien of the certificate holders. Despite some *dicta*, there is nothing more in this case.

B.

THE DECISIONS OF THE STATE COURTS.

The cases in the state courts fall within two general classes: (a) those holding to what may be called the majority rule, supported by the weight of authority; and (b) those adhering to the Massachusetts rule.

(a) The Majority Rule.

The decisions of the state courts are well summed up in a note in 1 British Ruling Cases, 25 (Lawyers' Co-Op. Pub. Co.), where it is said:

"In the United States the preponderance of authority is to the effect that where the removal of the fixture will not materially injure the premises, a seller thereof, retaining title thereto, may assert his right as against a prior mortgagee of the realty. *Wood vs. Holly Mfg. Co.* (1893), 100 Ala., 325, 46 Am. St. Rep., 56, 13 So., 948; *Warren vs. Liddell* (1895), 110 Ala., 232, 20 So., 89; *J. L. Mott Iron Works vs. Middle States Loan, Bldg. & Constr. Co.* (1901), 17 App. D. C., 584; *Anderson vs. Creamery Package Co.* (1902), 8 Idaho, 200, 56 L. R. A., 554, 101 Am. St. Rep., 188, 67 Pac., 493; *Schumacher vs. Edward P. Allis Co.* (1896), 70 Ill. App., 556; *Baldwin vs. Young* (1895), 47 La. Ann., 1466, 17 So., 883; *Northwestern Mut. L. Ins. Co. vs. George* (1899), 77 Minn., 319, 79 N. W., 1028, 1064; *Cochran vs. Flint* (1877), 57 N. H., 514; *Langdon vs. Buchanan* (1883), 62 N. H., 657; *General Electric Co. vs. Transit Equipment Co.* (1898),

57 N. J. Eq., 460, 42 Atl., 101; *Duffus vs. Howard Furnace Co.* (1896), 8 App. Div., 567, 40 N. Y. Supp., 925, reversing (1895) 15 Misc., 169, 37 N. Y. Supp. 19; *Condit vs. Goodwin* (1905), 108 App. Div., 360, 95 N. Y. Supp., 1122, affirming (1904) 44 Misc., 312, 89 N. Y. Supp., 827; *Nicholas vs. Potts* (1901), 35 Misc., 273, 71 N. Y. Supp., 765; *Cor vs. New Bern Lighting & Fuel Co.* (1909), 151 N. C., 648, 65 S. E., 648; *Padgett vs. Cleveland* (1890), 33 S. C., 339, 11 S. E., 1069; *Davenport vs. Shantz* (1871), 43 Vt., 546; *Buzzell vs. Cummings* (1889), 61 Vt., 213, 18 Atl., 93; *Page vs. Edwards* (1892), 64 Vt., 124, 23 Atl., 917; *Paine vs. McDowell* (1898), 71 Vt., 28, 41 Atl., 1042; *German Sav. & L. Soc. vs. Weber* (1896), 16 Wash., 95, 38 L. R. A., 267, 47 Pac., 224; *New Chester Water Co. vs. Holly Mfg. Co.* (1892), 3 C. C. A., 399, 3 U. S. App., 264, 53 Fed., 19, affirming (1891) 48 Fed., 879. • • •

The doctrine that where the fixture may be removed without material injury, the seller may enforce his lien as against the prior mortgagee of the realty is applicable where the seller of the fixture has taken a chattel mortgage thereon. *Anderson vs. Creamery Package Mfg. Co.* (1902), 8 Idaho, 200, 56 L. R. A., 554, 101 Am. St. Rep., 188, 67 Pac., 493; *Andrews vs. Chandler* (1888), 27 Ill. App., 103; *Ellison vs. Salem Coal and Min. Co.* (1890), 43 Ill. App., 120; *Binkley vs. Forkner* (1888), 117 Ind., 176, 3 L. R. A., 33, 19 N. E., 753; *First Nat. Bank vs. Elmore* (1879), 52 Iowa, 541, 3 N. W., 547; *Crippen vs. Morrison* (1864), 13 Mich., 23; *Tift vs. Horton* (1873), 53 N. Y., 377, 13 Am. Rep., 537; *Hurxthal vs. Hurxthal* (1898), 45 W. Va., 584, 32 S. E., 237.

• • • • •

In opposition to the doctrine of the foregoing cases are those which support the so-called Massachusetts rule, which, taking the view that the rights of the mortgagee cannot be affected by an agreement to which he is not a party, hold such rights to be superior to those of the seller of the fixtures, retaining title thereto (*Watertown Steam Engine Co. vs. Davis* (1875), 5 Houst. (Del.), 192; *Hawkins vs. Hersey* (1894), 86 Me., 394, 30 Atl., 14; *Clary vs. Owen* (1860), 15 Gray, 522; *Hunt vs. Bay State Iron Co.* (1867), 97 Mass., 279; *Lorain Steel Co. vs. Norfolk & B. Street R. Co.* (1905), 187 Mass., 500, 73 N. E., 646; *Fuller-Warren Co. vs. Harter* (1901), 110 Wis., 80, 53 L. R. A., 603, 84 Am. St. Rep., 867, 85 N. W., 698; or taking back a chattel mortgage thereon (*Maguire vs. Park* (1885), 140 Mass., 21, 1 N. E., 750; *Pierce vs. Emery* (1856), 32 N. H., 484; *Frankland vs. Moulton* (1857), 5 Wis., 1)."

In *Campbell vs. Roddy*, 44 N. J. Eq., 244, there was a mortgage on an iron foundry and the land whereon it stood. The owner purchased machinery which was placed in the foundry, the vendor of the machinery taking a chattel mortgage to secure the unpaid purchase money. It was held that while the real estate mortgage would have attached to the machinery had the chattel mortgage not been taken, yet the chattel mortgage, having been taken, was a valid lien on the machinery, having priority over the real estate mortgage; that the real estate mortgagee obtained no right to a lien upon anything but the property as it was conditioned at the time of the execution of such mortgage; that the equitable way of dealing with the property was to preserve the right of the prior real estate mortgage

to the same degree of security which he would have enjoyed had the property remained as it was, when the real estate mortgage was executed; and that, as laid down in *United States vs. New Orleans R. R.*, 12 Wall., 362, and *Fosdick vs. Schall*, 99 U. S., 235, the prior real estate mortgage could only attach itself to the machinery in the condition in which it came to the mortgagor's hands. This case has been followed by the New Jersey court in a recent decision: *Oil City Boiler Works vs. N. J. Water & L. Co.*, 81 N. J. Law, 491.

In *Tift vs. Horton*, 53 N. Y., 337, the same doctrine was announced as between a prior real estate mortgagee and the holder of a chattel mortgage upon an engine and boiler used to operate an elevator. This case was lately followed in *Davis vs. Bliss*, 187 N. Y., 77; *Bernheimer vs. Adams*, 75 N. Y. Supp., 93, affirmed 175 N. Y., 472; *New York L. & I. Co. vs. Cosgrove*, 62 N. Y. Supp., 372, affirmed 167 N. Y., 601; *Duffus & Howard Furnace Co.*, 40 N. Y. Supp., 925; *Leibowitz vs. Thomson Real Estate Co.*, 143 N. Y. Supp., 802. *Tift vs. Horton* has not been departed from, notwithstanding *McFadden vs. Allen*, 134 N. Y., 489, which has been supposed to indicate a contrary tendency, but really went off on a question of equitable estoppel.

In *Binkley vs. Forkner*, 117 Ind., 176, an engine, boiler, saws, shafting and other machinery were sold for use in a factory already covered by a real estate mortgage, the purchase money for the engine, boiler, etc., being secured by a chattel mortgage thereon. It was held that the chattel mortgage was entitled to priority. And the court laid down the doctrine, that where chattels are of such a character as to retain their identity and distinctive characteristics after the annexation,

and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, or destroy or unnecessarily impair the value of the chattels, a chattel mortgage will preserve the personal character of the property, not only as between the parties, but as against a prior mortgagee of the real estate; that unless the detachment of the chattels would materially affect the security of the real estate mortgage by depreciating the value of the mortgaged property, or by dismantling it of an important fixture, *existing at the time the real estate mortgage was executed*, the precedent real estate mortgage only attaches to the interest which the mortgagor has in the chattels subsequently annexed, at the time of their annexation; and that if the detachment would occasion some diminution in the value, as it would have stood, had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case.

Eaves vs. Estes, 10 Kan., 314, was a similar case, involving a steam engine for a mill. It was held that, regardless of the manner of attachment, the intention of the parties that the engine should retain the character of personal property, was evinced by the chattel mortgage thereon, and that the same did not become subject to the prior real estate mortgage on the mill.

In *Edwards & Bradford Lumber Co. vs. Rank*, 57 Neb., 323, the same principles were announced.

We have referred to the foregoing cases in detail, because, though expressly adopted as authorities by the Supreme Court of Appeals of West Virginia, they were quite as expressly repudiated by the Circuit Court of

Appeals of the Fourth Circuit in *Tippett vs. Barham*, 180 Fed., 76, upon which that court in a large measure based its disposition of the case at bar. The inappropriateness of *Tippett vs. Barham*, in the decision of a West Virginia case at once becomes manifest.

The foregoing authorities, it is true, relate to the equities between real estate mortgagees and chattel mortgagees; but the same principles apply to real estate mortgagees and vendors of personal property annexed to the realty, where the vendor reserves title until the purchase money is paid.

In *First National Bank vs. Hyer*, 46 W. Va., 13, it was recognized that the doctrine of *Hurxthall vs. Hurxthall* was applicable to the case of a conditional vendor.

In *Wicks vs. Island Park Ass'n*, 229 Pa., 400, the plaintiff sold to the defendant engines and fixtures for generating electric light and power, the contract reserving title in the seller until final payment was made. The machinery was bolted to a cement platform on the land of the defendant. At the time of its installation, the land was subject to a mortgage, with after-acquired property clause, to secure a bond issue. It was held that the seller of the machinery was entitled to recover it, in default of payment of the purchase price, and that the seller's title was superior to that of the bondholders, who intervened.

In *Cox vs. New Bern Light & F. Co.*, 151 N. C., 62, there was a mortgage on the real estate, covering after-acquired property. Certain gas producing apparatus was installed and annexed to the plant, the vendor reserving title until the purchase money was paid. It was

held that the vendor of the apparatus was entitled to retake the same, as against the precedent real estate mortgagee; that the real estate mortgage could attach to the apparatus only subject to those conditions which accompanied it into the possession of the purchaser; that it was immaterial that the vendor of the apparatus knew that it was to be annexed to the real estate, and that a notice of reservation of title was not recorded; that the real estate mortgagee was entitled to no more than a preservation of the property in the same state in which it was at the time of the execution of his mortgage.

In *Davis vs. Bliss*, 187 N. Y., 77, a vendor's lien was reserved on real estate. Thereafter the purchaser of the real estate installed in the building on the premises an engine, placing the same upon a substantial foundation of cement and other materials, running an exhaust pipe from the engine room through the floor, ceiling and roof of the building, and connecting the engine by underground pipes with a gasoline tank outside the building, and by belts with the shafts in the mill. This engine was purchased under an agreement that title should remain in the seller thereof, until payment was made therefor; but on the other hand *the agreement for the sale of the real estate contained a clause providing that all machinery placed on the premises should become a part of the realty*. It was held, following *Tift vs. Horton*, that notwithstanding this substantial manner of annexation, the vendor of the engine was entitled thereto and had the right to recover damages against the vendor of the real estate for a conversion of the engine. This case is especially important, because some courts which are pledged to the so-called Massachusetts rule, have intimated, since the

case of *McFadden vs. Allen*, 134 N. Y., 489, that the New York courts have shown a tendency to depart from the decision in *Tift vs. Horton*. And see *Bernheimer vs. Adams*, 75 N. Y. Supp., 93, affirmed 175 N. Y., 472; *Duffus vs. Howard Furnace Co.*, 40 N. Y. Supp., 925; *Leibowitz vs. Thomson Real Estate Co.*, 143 N. Y. Supp., 802.

In *General Electric Co. vs. Transit Equipment Co.*, 57 N. J. Eq., 460, there was a conditional sale of an electric generator built on piers and of a switch board attached by spikes to the side of a power house. It was held that the reservation of title was valid as against a prior real estate mortgage. And see, to the same effect, *Oil City Boiler Works vs. N. J. Water & L. Co.*, 81 N. J. Law, 491; *Daly vs. New York, etc., R. Co.*, 55 N. J. Eq., 602.

In *Northwestern Mut. L. Ins. Co. vs. George*, 77 Minn., 319, a building, subject to mortgage as part of the real estate, was constructed and used for cold storage purposes, the natural system of refrigeration being used. The mortgagor in possession purchased an artificial system of refrigeration, which was installed in the building, the vendor reserving title until payment was made. In installing the new apparatus, some of the apparatus of the old natural system was removed and some other minor changes were made in the building. All the new system could be removed, without material injury to the building or apparatus; but, upon such removal, the building could not be used for cold storage purposes, without putting in another artificial refrigeration system or restoring the old natural system. The latter could have been done at a cost of \$1,700 or \$1,800. It did not appear that the removal of the pres-

ent artificial system would have rendered the building worth any less for cold storage purposes than it would have been had the changes never been made. It was held that the apparatus, not having been paid for, did not become a part of the real estate, or subject to the prior mortgage thereon, but might be removed by the vendor, the court saying that the plaintiff was merely a mortgagee out of possession, and was never misled, and advanced no consideration on the strength of the machinery becoming a part of the realty; and that the apparatus did not become a part of the realty.

In *Fred W. Wolf Co vs. Hermann Savings Bank*, 168 Mo. App., 549, a brewery and the land on which it stood were incumbered by a mortgage. Thereafter refrigerating apparatus furnished to the owner of the brewery, under a contract, reserving title in the vendor until the purchase price was paid, was installed in the brewery. It was held that, as the refrigerating apparatus could be removed without substantial injury to the freehold, or to the security which the mortgagee had at the time of its addition to the plant, the title to the apparatus remained in the vendor until payment of the purchase price, as against the mortgagee.

In *Blanchard vs. Eureka Plan. Mill Co.*, 58 Ore., 37, a real estate mortgage covered the land and a planing mill situate thereon. Later, certain planing mill machinery was delivered to the owner of the mill, under contracts reserving title to the machinery, until the purchase price was paid. The price being unpaid, the vendors undertook to remove the machinery from the premises. The mortgagee brought suit to enjoin the removal, alleging that part of the machinery was firmly bolted to the building and became

part of the realty, and alleging, as to the residue of the machinery, that the money loaned by him was loaned to be used in purchasing machinery, including that in dispute, with the understanding that it was to be placed in the mill, so as to become subject to the mortgage. It was held that, as between the vendors and the mortgagee, the lien of the mortgage did not attach to the machinery.

In *Baldwin vs. Young*, 47 La. Ann., 1466, the vendor of a heater and its attachments, placed in a building, under a contract of conditional sale, was accorded priority over an anterior real estate mortgage. This decision shows that the civil law recognizes the equitable character of the doctrine for which we contend.

In *Harris vs. Hackley*, 127 Mich., 46, a purchaser, who had contracted to buy real estate, purchased machinery, under an agreement that title should remain in the seller until paid for. The machinery could be removed without damage to the remainder of the property. It was held that it could not be withheld from the seller by the vendor of the realty, who by the terms of his contract was entitled in the event of a forfeiture, to a surrender of the property with all improvements, since, although such vendor stood in the position of an equitable mortgagee, he did not take his security on the faith of any appearance that the machinery was a part of the real estate.

In *Page vs. Edwards*, 64 Vt., 124, it was held that machinery sold under a contract of conditional sale would retain its character of personalty against the holder of an existing mortgage on the real estate, notwithstanding that the machinery in place when the

real estate mortgage was taken had been removed to make room for the machinery in question.

Authorities to the same effect might be multiplied indefinitely. Nor are such authorities to be found exclusively in the state reports, as we shall show.

(b) *The Massachusetts Rule.*

The Massachusetts rule, making the real estate mortgage paramount, rests upon the principal that a mortgagee is entitled to improvements made on the real estate, during the continuance of the mortgage, and that he cannot be deprived of this right by the agreement or acts of the mortgagor and a third party, entered into or done, without his consent.

Hunt vs. Bay State Iron Co., 97 Mass., 279.

Southbridge Savings Bank vs. Exeter Machine Works, 147 Mass., 542.

Hopewell Mills vs. Taunton Savings Bank, 150 Mass. 519.

Meagher vs. Hayes, 152 Mass., 228.

That this doctrine is not adopted or sustained by the weight of authority, is admitted by the Supreme Court of Wisconsin, which has adhered to the rule for more than fifty years. In *Fuller-Warren Co. vs. Harter*, 110 Wis., 80, the court say that the doctrine for which the petitioner contends may be the more equitable, that it is probably supported by the greater weight of authority, if that is to be determined by the number of decisions, and that possibly it may be founded on the better reasoning. But after half a century of adherence

to the Massachusetts rule, the court did not think themselves permitted to question that rule.

The Massachusetts rule that a mortgagee cannot be affected by an agreement made or acts done by the mortgagor and a third party, is based upon the doctrine as to the nature and effect of a mortgage, prevalent in Massachusetts. In that state the mortgagee is the holder of the legal title to the mortgaged land, and is entitled to enter and take possession, even before condition broken, in like manner as in England at common law.

Bradley vs. Fuller, 23 Pick., 9.

Winslow vs. Merchants Ins. Co., 4 Mete., 306.

Butler vs. Page, 7 Mete., 40.

Page vs. Robinson, 10 Cush., 99.

Hapgood vs. Blood, 11 Gray, 400.

Clary vs. Owen, 15 Gray, 522.

Norcross vs. Norcross, 105 Mass., 265.

And it logically follows from the conception that the mortgagee is the legal owner of the premises, and is entitled to possession thereof, that the mortgagor in possession can neither himself remove, nor authorize a third party to remove, an improvement made during the continuance of the mortgage. An attentive reading of the Massachusetts decisions, above cited, will show this to be the basis of the rule originated in that state, in regard to fixtures, where the rights of a mortgagee come in question.

The basis upon which the Massachusetts rule rests, is concretely illustrated by *Lorain Steel Co. vs. Norfolk & B. St. R. Co.*, 187 Mass., 50. Under a contract

reserving title, until the purchase price was paid, there was a sale of certain street railway rails, trucks, motors and motor equipment. When the contract was entered into, and the rails delivered, it was understood that they were to be used in the construction of a track for the railway company, and say the court, "an assent to such use by the vendor is implied from the very nature of the undertaking." The track was laid in the public streets. The railway company mortgaged its property to the American Loan & Trust Company, which was ignorant of the conditional contract. After foreclosure of this mortgage, the vendor of the rails, etc., brought an action of trover against the purchaser at the foreclosure sale, and the latter claimed that there was such annexation of the rails to the soil, as converted them into realty, for which an action of trover would not lie. It was held by the Supreme Judicial Court that the case did not fall within the doctrine announced in *Hunt vs. Bay State Iron Co.*, and other like cases, for the reason that in the case then at bar the railway company had no easement or freehold interest in the public streets; and that the conditional vendor was entitled to recover damages for the conversion of the rails, as well as the residue of the equipment which had been furnished by it. Here the absence of a freehold interest or easement in the streets, deprived the mortgagee of that legal title to, and right to possession of, the realty, which were the common law incidents of a mortgage. And in the absence of those incidents, the mortgage was not paramount to the reservation of title.

We do not undertake to say that the reason for the Massachusetts rule as to the right of the mortgagee to chattels annexed to the real estate, during the continu-

ance of the mortgage, has always been recognized in the states which have adopted that rule. We are free to confess that the Massachusetts rule has been adopted in some states, where the common law rights of a mortgagee, accorded to him in Massachusetts, are denied; and that, on the contrary, the Massachusetts rule has been rejected in some jurisdictions, where the common law rights of a mortgagee are upheld. But, at all events, the reason of the Massachusetts rule is manifest, and that reason, if regarded, must preclude the adoption of that rule in West Virginia, even if such cases as *Hurxthall vs. Hurxthall* and *First Nat. Bank vs. Hyer*, can be laid aside.

The doctrine which obtains in West Virginia in regard to deeds of trust, the use of a mortgage having become practically obsolete, is entirely different from the Massachusetts doctrine as to mortgages. Under the deed of trust, the trustee is regarded as holding the legal title for the benefit of both debtor and creditor. Neither the trustee nor the creditor is entitled to possession, before default, even in those cases wherein no express provision is made for the retention of possession by the debtor. In *Swann vs. Young*, 36 W. Va., 57, the Court say:

"And at this point it is not out of place to say something about a deed of trust under our statute, as compared with a mortgage; for the argument of the learned counsel for plaintiff seems to take it for granted that the two securities are the same in all essentials and incidents relating to the equity of redemption. In this state mortgages are not unknown, but their use is rare, compared with that of the deed of trust. See Code W. Va., 1849

(Ed. 1860), c. 117, sec. 5. The deed of trust is a security on land in this case for the payment of a debt. The trust-debtor has conveyed his land to the trustee as a security for the payment of the trust-creditor's debt, and with the power in the trustee, if it be not paid when due, to sell, and pay out of the proceeds. The trust-creditor has not an estate upon condition like the old mortgagee in the time of Littleton. He has at no time, by virtue of his deed of trust, an estate of any kind. He has a chose in action, made a specific lien by contract and not by change of possession on a certain tract of land; and there never comes a time when he or his representative has more or other than that; nor has he, at any stage, the right to the possession, unless it is expressly given to him by the deed, (a thing rarely done, and not done in this case,) or a right to enter upon the land. The trustee has no right to the possession until default made in payment of the trust-debt, and then only for the purpose of making the sale, or of preserving the property pending proceedings for the purpose of making a sale. Without express contract to the contrary, the trust-debtor is entitled to the possession of the land down to the sale or commission of waste or to the beginning of proceedings to make the sale. Like a mortgage, the debt secured is the principal thing; hence it is that the doctrines relating to the deed of trust are by text writers and by courts generally classified and explained under the head of 'mortgages.' " * * *

C.

THE DECISIONS OF THE FEDERAL COURTS.

In *U. S. vs. New Orleans R. R.*, 12 Wall., 326, it was distinctly held that a railroad mortgage, with after-acquired property clause, could not operate as against a subsequent seller of rolling stock, who had reserved title under the payment of the purchase price, even though his contract was not recorded. The court, while upholding the validity of an after-acquired property clause, say:

"That doctrine is intended to subserve the purpose of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquired; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not

come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors."

In *Fosdick vs. Schall*, 99 U. S. 239, a similar case, the court, following *U. S. vs. New Orleans R. R.*, say:

"The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less."

These decisions have been approved and followed repeatedly:

Fosdick vs. Southwestern Car Co., 99 U. S., 256.

Myer vs. Western Car Co., 102 U. S., 1.

Bear Lake Irr. Co. vs. Garland, 164 U. S., 1.

York Mfg. Co. vs. Cassel, 201 U. S., 344, 351, 352.

In *Bear Lake Irr. Co. vs. Garland*, 164 U. S., 1, there was a prior real estate mortgage, covering after-acquired property. After its execution a contractor constructed a number of miles of irrigation ditches, absolutely necessary to the works of the company, the vesting of the title to the lands on which the ditches were constructed being conditional upon the construction of the ditches. It was held that a lien claimed by the contractor for constructing these ditches was superior to the prior mortgage containing the after-acquired property clause. The court following *U. S. vs. New Orleans R. R.*, and *Fosdick vs. Schall*, laid down anew the proposition that a prior real estate mortgage, though his mortgage contain an after-acquired clause, has no right to after-acquired property,

except subject to the liens or conditions which accompany the property at the time it is acquired by the mortgagor.

In *Holly Mfg. Co. vs. New Chester Water Co.*, 53 Fed., 192, 48 Fed., 879, title was reserved upon the pumping engine of a water works system, securely fastened to foundations situated on mortgaged real estate in Pennsylvania, the real estate mortgage containing an after-acquired property clause. It was held by the Circuit Court of Appeals of the Third Circuit, following *U. S. vs. New Orleans R. R.*, 12 Wall., 362, and distinguishing *Porter vs. Pittsburgh Steel Co.*, 122 U. S., 567, that the holder of the reservation of title ought to prevail. This holding is in harmony with that of the Supreme Court of Pennsylvania. *Wicks vs. Island Park Assn.*, 229 Pa., 400.

In *Re Sunflower State Ref. Co.*, 195 Fed., 180, a conditional sale was made of certain machinery, known as a wax distillate, chilling press plant, refrigerator plant, filter press plant, pumping plant, generators, etc. This machinery was installed in a building in Kansas, designed by the vendor and built in accordance with its specifications for the express purpose of receiving said machinery. The machinery was installed by the vendor and attached by means of bolts imbedded in the cement floor. The purchaser had theretofore executed a mortgage with after-acquired property clause, which was duly recorded prior to the conditional sale. It was held by the Circuit Court of Appeals of the Eighth Circuit, that the unpaid vendor was entitled to reclaim the property, as against the holders of the bonds secured by the prior mortgage, following in this respect *U. S. vs. New Orleans R. R.*, *Fosdick vs. Schall*, and *Myer vs.*

Western Car Co., supra, and distinguishing *Porter vs. Pittsburgh Steel Co.*, and other cases in this court. The court said:

"The property itself was personal property, beyond question, prior to its being placed upon the real estate. The parties to the contract of sale never intended that it should become a part of the realty because they specifically contracted and agreed that it should not."

This decision is consistent with *Eaves vs. Estes*, 10 Kan., 314.

There is another and distinct class of cases in this court, which have been decided in favor of the prior mortgagee, and which appear to have been misunderstood by some of the inferior federal courts. In all of these cases there was involved the property of a quasi-public corporation, the preservation of the integrity of which, upon special grounds of public interest and necessity, has always been aided. Apt illustrations will readily occur, as in the assertion of jurisdiction to foreclose a mortgage covering a railroad situate in several states (*Muller vs. Dows*, 94 U. S., 444), and the creation of the "six months rule." (Cf. *Wood vs. Guarantee Trust Co.*, 128 U. S., 416; *Gregg vs. Metropolitan Trust Co.*, 197 U. S., 183, and cases cited.) The distinction, while not frequently referred to, was expressly recognized in *Porter vs. Pittsburgh Steel Co.*, 122 U. S., 267. The court there say:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being

unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles *which become annexed to and a part of the railroad* covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."

But a broader line of demarcation exists. In the cases in which the after-acquired property clause has been accorded superiority, the after-acquired property was of such character and was employed in such manner that it became an integral part of the mortgaged realty and lost its separate identity. And in almost every instance the reserved title or lien was attempted to be asserted, not against the after-acquired property in the form in which it was brought onto the mortgaged land, but against the after-acquired property in a new and distinct form, as a different entity, created by the very act of annexing it to, and merging it in, the land.

In every case in this court, where the reservation of title or lien of the claimant accompanied into the possession of the mortgagor the identical, separate thing against which the reservation of title or lien was sought to be enforced, whether that thing was personalty (*U. S. vs. New Orleans R. R.*, *Fosdick vs. Schall*, *Fosdick vs. Car Co.*, *Myer vs. Car Co.*), or whether it was real estate (*Bear Lake Irr. Co. vs. Garland*), the reservation of title or lien has been sustained, as against the prior mortgagee.

But where the thing to which the title or lien is sought to be retained, becomes, by the very fact and method of annexation, physically merged in the realty, as an integral part thereof, so that, when the day for the enforcement of the reservation arrives, the chattel brought upon the premises no longer exists, and the reservation must be upheld if at all, by fixing it to a new thing created by the annexation in contemplation when the mortgagor acquired the chattel, and the enforcement of the reservation must be destructive, not only of the integrity of the realty, but of the changed form which the chattel has assumed by its merger with the realty, a very different case arises.

Illustrations, aside from the familiar ones of windows and doors in a house, so frequently found in the reports (*Binkley vs. Forkner*, 117 Ind., 176; *Campbell vs. Roddy*, 44 N. J. Eq., 244), will readily occur. Suppose that a vendor of brick, to be used for the construction of a house on incumbered land, attempts in due form, to reserve title to the brick, until he is paid therefor. The brick are used as contemplated and not paid for. No one would contend that he could tear down the house and remove the brick. The reason is plain. The brick, by the method of their physical annexation, have not only become merged in the real estate, but are, in fact, no longer brick, but an integral part of the house. The thing which the vendor brought upon the premises, accompanied with the reservation, is gone. A new thing has arisen. (See *Fred W. Wolf Co. vs. Hermann Savings Bank*, 168 Mo. App., 549, 552.)

Take the case of a waterworks stand-pipe, a ponderous structure of steel, perhaps a hundred feet in height,

sunk into the earth twenty feet, and imbedded in concrete. A manufacturer brings upon the land, not the stand-pipe, already incumbered with a reservation, but so many tons of steel plates, bolts, rivets, girders and concrete. The stand-pipe is brought into being by the very fact, and in the very act, of annexing it to an already mortgaged tract of land and of creating it into realty. Will it be contended that he has effectually reserved title to the stand-pipe, which had no existence, until constructed on the mortgaged land? To ask the question is to answer it in the negative. The same comment obviously applies to bridges, docks, and other property of like character.

In *Porter vs. Pittsburgh Steel Co.*, 122 U. S., 267, the property involved was railroad bridges, built on land owned by the railroad company, and the contracts for the construction of the bridges had provided that in case of non-payment therefor, the builders should have a right to remove the bridges and bridge materials. A prior mortgage, with after-acquired property clause, already covered the railroad. It was held that the mortgage was a first lien on the bridges. The decision went on the two-fold ground that the railroad was a quasi-public corporation, and that the bridges became a part of the permanent structure of the railroad. It is apparent that the bridges were not brought upon the land accompanied with a reservation of title, but were constructed on the incumbered land by means of materials furnished and labor performed. The bridges came into existence for the first time on the mortgaged land. They were new things created by the very fact and act of annexation to the realty, without which they would have had no existence at all. That they could have been

removed from the land in their entirety was practically impossible. Removal could have been accomplished only by dismantling the structures, and this is best manifested by the fact that the contractors proceeded, not for the specific recovery of the bridges, but for a preferential payment of the contract price.

In *Toledo D. & B. R. Co. vs. Hamilton*, 134 U. S., 296, the contractor claimed a lien for the construction of a dock on land to which the railroad company had a good equitable title, and which was covered by a pre-existing mortgage, with after-acquired property clause. The dock, of course, was not brought onto the land, accompanied with a lien in favor of the contractor. He furnished labor and materials, which were converted, by the very act of annexation to the encumbered land, into the dock in question. Of this case and another it was said in *Bear Lake Irr. Co. vs. Garland*, *supra*:

"This principle is in entire harmony with that laid down in the already cited cases of *Galveston, H. & H. R. Co. vs. Cordrey*, 78 U. S., 11 Wall., 459, and *Toledo D. & B. R. Co. vs. Hamilton*, 134 U. S., 296, and with the cases therein referred to. In neither of the above mentioned cases did the title to the property come into the hands of the company burdened with any lien. Most of the property in the first above cited case came to the company before any work was done, and a small portion only was purchased by it after the work was done, and it was held that the lien of the mortgage upon the property as after acquired was superior to that of the constructor who did the work. His work did not transfer the title or create the condition upon which the vesting of the title could take place in

the mortgagor, and consequently there was no basis for the claim that the property came to the mortgagor burdened with the lien. In the *Toledo Case* the dock was built upon property to which the mortgagor had a good equitable title and which was covered by the mortgage, just the same as if the title were a legal one, and it was held that the dock became subject to the lien of the mortgage as prior and superior to any lien of the mechanics for construction."

The remaining cases in this court relate to railroad tracks under varying states of facts. In *Dunham vs. Cincinnati Etc. R. Co.*, 1 Wall., 254, the contractor endeavored to assert a lien on an entire section of railroad constructed by him, under a contract providing that he was to keep possession and control of that section and its earnings until he had been fully paid. The roadbed was already subject to a mortgage, with after-acquired property clause, at the time he took possession of the section and performed his work. See the comments on this and the following cases in *General Electric Co. vs. Transit Equipment Co.*, 57 N. J. Eq., 460, 475.

In *Galveston Etc. R. Co. vs. Cowdrey*, 11 Wall., 459, rails already owned by the Company were pledged to Pulsford and afterwards used in the construction of the railroad, under an agreement that he should have a special lien on these rails. The railroad was already subject to mortgages, with after-acquired property clauses. The rails must have been incumbered with the mortgages at the time of the pledge to Pulsford. In a suit to foreclose the mortgages, he filed an intervening petition, claiming a lien, not on the rails, but on

the section of road in the construction of which the rails were used. Assuming that the lien was claimed merely against the rails, they had lost their separate identity as rails, upon which the lien had been reserved. They had been firmly fastened to the roadbed and by that annexation converted into a new thing, to wit: a railroad track, which was an integral part of the realty. And the rails could not have been removed without utter destruction of the track. In *Bear Lake Irr. Co. vs. Garland*, *supra*, this court distinguish the *Cowdrey Case*.

In *Dillon vs. Barnard*, 21 Wall., 430, a contractor who built a section of railroad unsuccessfully endeavored to avail himself of a clause of a pre-existing mortgage, relating to the creation of liens. He was relegated to such rights as he possessed under his contract with the railroad company, and stood as a mere general creditor.

In *Thompson vs. White Water, etc. R. Co.*, 132 U. S. 68, the owner of a railroad subject to a mortgage with after-acquired property clause leased it, and the lessee under its agreement constructed a section of the railroad then remaining uncompleted. The lessee claimed a prior lien on the section of railroad thus constructed, but the mortgage was accorded priority.

In every one of the foregoing cases the claim adverse to the prior mortgage, growing out of the annexation of rails or other similar property, was asserted, with full recognition that the rails themselves had become merged in the realty as a permanent part of the railroad. The claim in every instance was not to a recovery of the rails, but to a prior charge against the section of railroad upon which the rails had been laid.

It may be conceded that from an ocular standpoint the merger with the realty and loss of identity is not quite so complete in the case of rails laid in a track, as in the case of steel or concrete used in a bridge or dock, and that the local havoc wrought by pulling up the rails would be a little less than that of tearing down the bridge or dock to enable the vendor to carry away the materials. But this is merely to say that the facts of one case may carry it a little closer than another to the line separating that class of cases, embracing *U. S. vs. New Orleans R. R.*, from the class embracing *Porter vs. Pittsburgh Steel Co.*, and *Toledo D. & B. R. Co. vs. Hamilton*. However difficult it may be to classify the facts of a particular case, the line separating the two classes is existent and plain; and it is equally clear that the cases involving railroad tracks fall upon one side of the line and the case at bar falls upon the other side. It may be objected that the difference between the two classes of cases is only a difference of degree. But Mr. Justice Holmes once took occasion to state that there is, in the law, frequent recognition of differences of degree, and that they are none the worse for being such.

In this connection, one or two cases in the Circuit Courts of Appeals, not heretofore noticed, deserve a brief mention.

Harris vs. Youngstown Bridge Co., 90 Fed., 328, in the Circuit Court of Appeals for the Sixth Circuit, is interesting because it illustrates both phases of the subject. A mortgage was executed, covering after-acquired property. Thereafter the bridge company entered into a contract with a trust company, whereby the latter purchased for the bridge company land required

for approaches to its bridges, a lien being created in favor of the trust company to secure the purchase money payable by the bridge company to the trust company. After this acquisition of the land, the bridge approaches were erected. It was held correctly, first, that the lien in favor of the trust company having attached to the land at the very time when the equitable title thereto vested in the bridge company, that lien was superior to the pre-existing mortgage; and, second, that the bridge approaches having been erected on the land after the equitable title vested in the bridge company, the asserted claim to a lien for the construction thereof, was subordinate to the mortgage. The trust company's lien fell within the doctrine of *U. S. vs. New Orleans R. R.*; *Fosdick vs. Schall*; *Myers vs. Western Car Co.*, and *Bear Lake Irr. Co. vs. Garland*. The lien for the construction of the bridge approaches was governed by *Toledo, D. & B. R. Co. vs. Hamilton*, and *Porter vs. Pittsburgh Steel Co.*

The case of *Tippett vs. Barham*, 180 Fed., 76, in the Circuit Court of Appeals for the Fourth Circuit, we think to have been decided correctly, on reasoning marvelously incorrect. The subject matter was a water-works standpipe, the property of a quasi-public corporation, not brought upon the land, accompanied with a reservation of title, but constructed on the incumbered land by means of materials furnished and labor performed. The standpipe came into existence for the first time on the mortgaged land. It was a new thing created by the very fact and act of annexation to the realty, without which it would have had no existence at all. It was erected upon a foundation of concrete twenty-five feet in diameter and ten feet in depth, and

attached to the foundation by anchor bolts ten feet long and two inches in diameter, imbedded in the foundation. The standpipe itself was eighteen feet in diameter and one hundred and forty feet high above the top of the foundation. That it could have been removed from the land in its entirety was practically impossible. Removal could have been accomplished only by the dismantling of the structure, and this is best manifested by the fact that the contractor proceeded, not for the specific recovery of the standpipe, but for a preferential payment of the contract price.

But candor requires us to say that we think that *Phoenix Iron Works Co. vs. N. Y. S. & T. Co.*, 83 Fed., 757, and *Evans vs. Kister*, 92 Fed. 836, in the Circuit Court of Appeals for the Sixth Circuit, involving power house machinery, and so much relied on in *Tippett vs. Barham*, were incorrectly decided, unless they can be sustained as involving quasi-public property. But even that much cannot be said in justification of *Union Trust Co. vs. Southern Sawmill Co.*, 166 Fed., 193, a North Carolina case decided by the Circuit Court of Appeals for the Fourth Circuit, which is directly at war with *Cox vs. New Bern Light. & F. Co.*, 151 N. C., 648.

III.

THE TANKS IN QUESTION WERE "LOOSE PROPERTY," WITHIN THE MEANING OF THE DECISIONS OF THIS COURT.

The error into which some of the lower federal courts have fallen, has been due, in a great measure, to a misunderstanding of the scope of the phrase "loose property," employed in *U. S. vs. New Orleans R. R.*, and *Porter vs. Pittsburgh Steel Co.* In the former case Mr. Justice Bradley says:

"Had the property sold by the government to the Railroad Co. been rails * * * or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the Railroad Co. itself, are unaffected by a prior general mortgage, given by the Company and paramount thereto."

And in *Porter vs. Pittsburgh Steel Co.*, Mr. Justice Blatchford says:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled in the decisions of this court, that rails and other articles which become affixed to and part of the railroad covered by a prior

mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."

By the phrase of "loose property" we think it clear that this court intended to do no more than to point out the distinction which it has enforced in all of its decisions, between property *retaining a separate identity and susceptible of separate liens*, on the one hand, and property physically merged with the real estate, on the other hand. Property is none the less loose because it does not embrace within itself a motive power of its own, as in the case of a locomotive, or perfect mobility, as in the case of a car.

In *Bear Lake Irr. Co. vs. Garland*, *supra*, the subsequent acquired property was in no literal sense loose; but the identity was preserved and the prior mortgagee was defeated in this court.

In *Binkley vs. Forkner*, 117 Ind., 176, the Supreme Court of Indiana well say:

"The distinction between chattels whose completeness and identity, as separate and distinct articles, may be preserved, notwithstanding their annexation, and those which necessarily become absorbed and merged in the realty by being annexed, must be kept in view. *Porter vs. Pittsburgh Bessemer Steel Co.*, 122 U. S., 269, 283." * * *

And see to the same effect *Campbell vs. Roddy*, 44 N. J. Eq., 244.

Within the correct sense of the term "loose property" we submit that the tanks now in controversy were loose property. Though the court below adverted to the size of the tanks, and said that their gravity was sufficient to hold them in place without fastening, this observation might with equal force be made of an eight gallon keg, a table or a chair. The matter of size and weight is, after all, one of comparison, bearing relation to the mechanical means at hand for the purpose of removal. A modern locomotive could be moved easily with a crane, though it might afford some difficulty to a man with a wheelbarrow. But it is not supposed that this would afford an obstacle to the application of the holding in *U. S. vs. New Orleans R. R.*, in case the locomotive were furnished under a car trust agreement.

In *Holly Mfg. Co. vs. New Chester Water Co.*, 53 Fed., 19, affirming 48 Fed., 879, the pumping engines, though firmly affixed to the realty, were held to be "loose property" within *U. S. vs. New Orleans R. R.*, rather than within *Porter vs. Pittsburgh Steel Co.*; so with the wax making machinery in *Re Sunflower State Ref. Co.*, 195 Fed., 108; the radiators in *J. L. Mott Iron Works vs. Middle States, etc., Co.*, 17 App. D. C., 584; the gas apparatus in *Cox vs. New Bern Light & F. Co.*, 151 N. C., 648; the electric light and power machinery in *Wicks vs. Island Park Ass'n.*, 229 Pa., 400, and *General Electric Co. vs. Transit Equipment Co.*, 57 N. J. Eq., 460; the refrigerator apparatus in *Northwestern Mut. L. Ins. Co. vs. George*, 77 Minn. 319, and *Fred W. Wolf Co., vs. Hermann Savings Bank*, 168 Mo. App., 549, and the iron foundry equipment in *Campbell vs. Roddy*, 44 N. J. Eq., 244.

In *Holly Mfg. Co. vs. New Chester Water Co.*, 48 Fed., 879, in referring to the pumping engines, firmly affixed to the realty as above mentioned, the court says:

"This case belongs rather to that class of cases of which *U. S. vs. Railroad Co.*, 12 Wall., 362, is the exponent, than to the class represented by *Porter vs. Steel Co.*, 122 U. S., 267. The subject matter of contest in the former of these cases was after acquired rolling stock of a railroad, which by the purchase contract was charged with a lien for the price. * * * It was there added that the result would be different in the case of rails or other materials which became a part of the principal thing. In the case of *Porter vs. Steel Company*, *supra*, railroad bridges were the subject matter of controversy. But rails and bridges necessarily become an actual part of the permanent structure of a railroad, and are inseparable from it without destruction to the road. In that respect they are like the stones and bricks of a house. *But detachable and removable machinery is susceptible of ownership distinct from the land and buildings, and may be the subject of particular and separate liens.*"

In the same case, the Circuit Court of Appeals in 53 Fed., 19, say:

"The present case does not fall within the class of cases cited by appellants' counsel, in which it has been held that the rails and bridges of a railroad, of necessity, become a permanent part of the whole structure, and therefore cannot be made the subject of special liens, but is more analogous to the class in which the rolling stock of a railroad

company has been held to be the subject of a conditional sale, and on which a lien may be reserved by the vendor. And this appears to be reasonable. Locomotives, engines and cars are as essential to the operation of a railroad as pumping engines are to waterworks, but it has been held that the former may be treated as personal property, and as such may be liable to a lien in favor of the seller, which will not be lost in consequence of a prior mortgage which, by its terms, was made to cover after-acquired property."

IV.

THE VIEW THAT THE PETITIONER IS PRECLUDED FROM ASSERTING ITS TITLE TO THE TANKS, BECAUSE THE TANKS ARE NECESSARY TO THE OPERATION OF THE BREWERY, IS WITHOUT MERIT, EITHER IN LAW OR FACT.

It was argued by the respondent in the court below, with some evident success, that by the removal of the tanks, the operation of the brewery would be prevented—that the brewery would cease to be a brewery and its integrity would be destroyed.

The necessity for these tanks was a necessity arising not out of their peculiar character or relation to the brewery; but a necessity, if such it may be termed, arising out of the fact that the Brewing Co. had been enabled under its contract with the petitioner to obtain possession thereof, and, if the contractual obligations were enforced, would be compelled to pay for the tanks, or to purchase and pay for a substitute.

The argument on the other side reduces itself, in the last analysis, to the proposition that the purchaser of machinery under a contract of conditional sale, is entitled to retain it in any event; that the inability or unwillingness to pay for machinery already purchased entitles a purchaser to keep it, without paying for it, if the machinery is requisite for the operation of a manufacturing plant. If such a contention were sound, then it is apparent that all of the cases on the subject have been wrongly decided; for in all of the cases which we have cited, relating to manufacturing plants, the removal of the machinery would likewise have reduced the plant to idleness, until a substitute was obtained. And the property of which the railroad companies and irrigation company were deprived in *U. S. vs. New Orleans R. R.*, *Fosdick vs. Schall*, *Myers vs. Western Car Co.*, and *Bear Lake Irr. Co. vs. Garland*, was no less essential to the integrity of their systems.

The argument of necessity was pressed without avail in the following cases:

Harris vs. Hackley, 127 Mich., 46, 50.

Wolford vs. Baxter, 33 Minn., 12.

The truth is that the contention involves the erroneous assumption, that the prior mortgagee of the real estate is entitled to a continuance of the real estate in the condition in which it is after the annexation of the chattel; whereas the authorities show that he is entitled to no more than a preservation of the security as it was at the time when the mortgage was taken. If the removal of the fixture involves any material injury to the real estate, the prior mortgagee is entitled to equitable compensation for such injury,

but he can have no higher right to the fixture itself than the purchaser thereof acquired.

In *Hurxthall vs. Hurxthall*, 45 W. Va., 584, the milling machinery was quite as necessary to the mill as are the tanks to the brewery in the case at bar, and yet it was never intimated that because the removal of the machinery would reduce the mill to idleness, the chattel mortgagee lost his right. On the contrary, the court say, quoting from *Binkley vs. Forkner*:

"A chattel mortgage is effectual to preserve the character of the chattels mortgaged, as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate or the buildings thereon. If the detachment would occasion some diminution in the value of the realty *as it would have stood had the attachment not been made*, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case."

In *Campbell vs. Roddy*, 44 N. J. Eq., 244, the machinery in question was quite as necessary to the operation of the foundry as are the tanks to the brewery. But the court say:

"The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession but he obtained no right by the terms of his mortgage, to a lien upon anything *but the property as it was conditioned at the time of its execution*. He could not compel the mortgagor to

add anything to it. So long, therefore, as he is secured the full amount of the indemnity *which he took*, he has no ground for complaint. There is, therefore, no inequity towards the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, and in protecting the lien of the latter to its full extent, so far as it will not diminish the original security of the former. As already remarked the real estate mortgagee is entitled to any annexation made by the mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made annexation, was an equity of redemption. So far as this interest had a value, it became subject to the lien of the prior real estate mortgagee, but the value of his interest was the value of the property subject to the lien."

Then citing with approval *U. S. vs. New Orleans R. R.*, and *Fosdick vs. Schall*, the court continue:

"Or in my view the equitable way of dealing with property is to preserve the right of the prior real estate mortgagee to the same degree of security which he would have enjoyed had the property remained as when mortgaged."

And see to the same effect, *Fred W. Wolf Co. vs. Hermann Savings Bank*, 168 Mo. App., 549, 553, 554.

In *Northwestern Mut. Life Ins. Co. vs. George*, 77 Minn., 319, the court expressly considered the point that the removal of the refrigerating apparatus, to which title had been reserved by the seller, would render the plant worthless for cold storage purposes,

unless new machinery was substituted, or the old natural system restored at a cost of \$1,700 to \$1,800; but this was held not to militate against the right of the seller, although the refrigerating apparatus in question had been substituted for a system in existence at the time when the mortgage was executed.

In *Cox vs. New Bern Light. & F. Co.*, 151 N. C., 62, a similar contention was ruled in the same way, though the gas apparatus on which title was reserved, was placed on the mortgaged premises in lieu of apparatus in existence at the time when the mortgage was given, and the latter apparatus was dismantled and its value destroyed. The court held that the mortgagee was entitled to no more than a preservation of the value of the premises, as they were at the time the mortgage was executed, and that it did not appear that, by the removal of the old apparatus, the value was diminished.

In the case at bar, the facts are undisputed, that the removal of the tanks would not diminish the value of the mortgage security, as it existed at the time when the mortgage was executed.

That, at the foreclosure sale, one of the bondholders bid but \$500 for the tanks, \$4,000 for the brewery without the tanks, and \$10,000 for the brewery with the tanks, is not impressive, especially when those bids were made pending this suit by bondholders and their associates, who were at the time engaged in contesting the petitioner's claim. No one is likely to be deceived by a bid of \$10,000 for a brewery which cost \$177,000 before the tanks were purchased, or by a bid of \$500 for

tanks as good as new, for which the manufacturer's price was \$5,480, or by the pretense that the loss of tanks, worth \$500, would depreciate the property to the extent of \$6,000.

Nor does the Massachusetts rule establish the integrity theory, countenanced by the Circuit Court of Appeals. We need, perhaps, go no further than *Hunt vs. Bay State Iron Co.*, 97 Mass., 283, where a reservation of title to rails, used in the construction of a railroad, was held valid, as between the parties, though not as against a prior mortgagee or a subsequent purchaser or mortgagee for value, without notice. And to the same effect are *Southbridge Savings Bank vs. Exeter Machine Works*, 127 Mass., 542, and *Hopewell Mills vs. Taunton Savings Bank*, 150 Mass. 519.

The case of *Lorain Steel Co. vs. Norfolk & B. St. R. Co.*, 187 Mass., 50, is a complete refutation of the notion that the Massachusetts doctrine is founded on or supports this integrity theory. Under a contract reserving title, until the purchase price was paid, there was a sale of certain street railway rails, trucks, motors and motor equipment. When the contract was entered into, and the rails delivered, it was understood that they were to be used in the construction of a track for the railway company, and, say the court, "an assent to such use by the vendor is implied from the very nature of the undertaking." The track was laid in the public streets. The railway company mortgaged its property to the American Loan & Trust Company, which was ignorant of the conditional contract. After foreclosure of this mortgage, the vendor of the rails, etc., brought an action of trover against the purchaser at the fore-

closure sale, and the latter claimed that there was such annexation of the rails to the soil, as converted them into realty, for which an action of trover would not lie. It was held by the Supreme Judicial Court that the case did not fall within the doctrine announced in *Hunt vs. Bay State Iron Co.* and other like cases, for the reason that in the case then at bar the railway company had no easement or freehold interest in the public streets. And so the conditional vendor was held entitled to recover damages for the conversion of the rails, as well as the residue of the equipment which had been furnished by it. It must be apparent that if the Massachusetts rule rested on the integrity theory advanced by the appellees, the conditional vendor must have failed; for the right of the conditional vendor to recover the rails and equipment furnished by it, or damages in lieu thereof, tended as greatly to the destruction of the street railway system, as if the railway company had been seized in fee simple of the street.

The real basis of the Massachusetts rule has been pointed out under a previous head to which we refer.

Because of the similarity of the property involved, we conclude the discussion of this integrity theory with the following excerpt from *Wolford vs. Baxter*, 33 Minn., 12, cited by the respondents in the court below. The owners of a brewery executed a mortgage on the realty, and later executed a mortgage covering certain casks, hogsheads, fermenting tubs and a copper cooler. In a contest between the two mortgagees, the court say:

“It is true that they were well adapted and necessary for carrying on the brewing business, to

which the premises were appropriated; but this of itself is quite an immaterial element in determining the nature of an article. Many articles of a purely personal nature are useful and necessary in carrying on a particular business which can in no just sense be termed fixtures. These articles were no more essential to the brewery business than were the ice tools, pitching machine, or ordinary beer kegs, or are farm machinery for the business of husbandry. It is also true that it is stipulated that these casks and tubs were constructed for the purpose of being put into and used in the brewery, and were placed there with intent that they should remain there for permanent use, and that the vaults were excavated for the special purpose of storing therein such hogsheads, and that the ice house was constructed for the special purpose of placing therein fermenting tubs in the first story and casks in the second; but it does not appear that the vaults were excavated or the ice house built in any special shape to suit these particular casks or tubs, or that the casks or tubs were constructed to fit into any particular place in the vaults or ice-house. They were adapted to receive any other casks or tubs as well as these, and any other casks or tubs would have been just as well adapted to be stored there as these. It is expressly stipulated that these tubs and hogsheads were of the same description as those in general use in breweries, and that they might be sold to other brewers for the purpose for which they were constructed. They were readily removed from the vaults and ice-house, and in fact were removed once a year or oftener outside for the purpose of being pitched or repaired. We can

see no particular difference between them and ordinary beer kegs, except that they were used exclusively inside of the vaults or ice-house, and being larger, were somewhat more difficult to move. The intent that they should remain in this brewery for permanent use there is unimportant. Intent alone will not convert a chattel into a fixture. A farmer may take a plow or any other farm implement upon his farm with intent to keep and use it there until it wears out, but this will not make it real estate. * * *

“What has been said as to the hogsheads and tubs will in the main apply to the copper cooler. It was a loose, movable utensil, the same as in common use in breweries. The only ground for a distinction between this and the other articles is that when in use it was connected by a hose to a stationary water tank in order to permit water to pass through it. When not in use the hose was disconnected and the cooler was laid away. The object and purpose of this temporary annexation was not to make the cooler a permanent accessory to the building, but for the purpose of using the article as a chattel. It may be on the facts a little closer case than that of the hogsheads and tubs, but the court below having found it to be personal property, we see no occasion to disturb his decision.”

V.**THE AFTER-ACQUIRED PROPERTY CLAUSE
IN THE MORTGAGE GAVE IT NO ADDITIONAL
EFFICACY, AS AGAINST THE PETITIONER'S
RESERVATION OF TITLE.**

The mortgage deed of trust of December 1, 1906, to Sells, trustee, contained the following clause:

"Together with the Brewery and all the buildings, machinery and appliances thereon erected or to be erected, with all the appurtenances thereto belonging or in anywise appertaining." * * *

But we think it plain, from the authorities, that these clauses conferred on the bondholders secured no additional right as against the petitioner, and that this clause could attach to the tanks, subject only to the reservation of title, which accompanied them into the possession of the Brewing Co.

In *U. S. vs. New Orleans R. R.*, 12 Wall., 362, it was distinctly held that a railroad mortgage, with after-acquired property clause, could not operate as against a subsequent seller of rolling stock, who had reserved title until the payment of the purchase price, even though his contract was not recorded. The court, while upholding the validity of an after-acquired property clause, say:

"That doctrine is intended to subserve the purpose of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage in-

tended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. *If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquired; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, of judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors.*"

In *Harris vs. Youngstown Bridge Co.*, 90 Fed., 328, in an able discussion, the court say, in part:

"The limitations of the rule are clearly drawn in the foregoing cases. The chief is that the mortgagee of after-acquired property is not a purchaser for value, and cannot acquire an interest by way of lien greater than that which the mortgagor has himself acquired. *The lien of the mortgage attaches to after-acquired property in the condition in which the mortgagor takes it from his vendor, and subject to all known liens and equities valid against the vendor, and also subject to all liens or equities valid against the vendee and mortgagor which arise in the act of purchase or acquisition, and therefore necessarily qualify its scope and ex-*

*tent. Thus, a vendor's lien on the property, good against the mortgagor, is prior in right to that of the mortgagee under an after-acquired property clause. So too, a purchase-money mortgage upon after-acquired property is not displaced by the lien of a prior mortgage of the mortgagor containing an after-acquired property clause, because in equity the purchaser is regarded as taking only the difference between the value of the property and the amount still due on the price. * * **

*"In cases of conditional sales to the mortgagor, the mortgagor, under the after-acquired property clause, obtains a lien subject to the same defeasance or forfeiture as that to which the title of his mortgagor is subject. * * **

"And it is even held that if the property comes into the hands of the mortgagor subject to a lien which is good against him, though, for want of formalities, it is not good against his subsequent attaching creditors and third persons, it is nevertheless prior to the lien of a mortgagee under an after-acquired property clause. And so, where the legal or equitable title of the mortgagor ripens and is acquired only through the outlay or expenditure of another, under such circumstances that, as between the other and the mortgagor, the former has a lien in equity upon the interest of the latter, the prior mortgage with an after-acquired property clause attaches only to the interest of the mortgagor subject to the same lien."

The doctrine laid down by *U. S. vs. New Orleans R. R.*, *supra*, has been followed repeatedly in the federal and state courts. The cases in which it has been applied show that it refers not only to mobile articles,

such as railroad cars, but to such chattels as the tanks in the case at bar, and even to real estate, as in *Bear Lake Irr. Co. vs. Garland*, 164 U. S. To quote from the opinions in these cases, would be but to repeat the language of *U. S. vs. New Orleans R. R.* It will suffice, we think, merely to cite the cases:

- Fosdick vs. Schall*, 99 U. S., 239.
Fosdick vs. Car Co., 99 U. S. 256.
Myer vs. Western Car Co., 102 U. S., 1.
Bear Lake Irr. Co. vs. Garland, 164 U. S., 1,
16, 23.
Cor vs. New Bern Light. & F. Co., 151 N. C.,
62.
Williamson vs. New Jersey South. R. Co., 28 N.
J. Eq., 277; 29 N. J. Eq., 311.
Wicks vs. Island Park Association, 229 Pa.,
400.
J. L. Mott Iron Works vs. Middle States Const.
Co., 17 App. Cas. (D. C.), 584.
Wood vs. Holly Mfg. Co., 100 Ala., 326.
Defiance Mach. Works vs. Trisler, 21 Mo. App.,
69.
Davis vs. Bliss, 187 N. Y., 77.
Botsford vs. New Haven, M. & W. R. Co., 41
Conn., 454.
Central Trust Co. vs. Marietta etc., R. Co., 48
Fed., 865, 868.
Holly Mfg. Co. vs. New Chester Water Co., 48
Fed., 879; 53 Fed., 19.
Harris vs. Youngstown Bridge Co., 90 Fed.,
328.
Evans vs. Kister, 92 Fed., 836.
Farmers L. & T. Co. vs. Denver & R. G. Co.,
126 Fed., 49.
Tilford vs. Atlantic Match Co., 134 Fed., 927.

In the case at bar there is nothing which withdraws it from the purview of the foregoing authorities. The Circuit Court of Appeals, it is true, in its opinion (from which Pritchard, Circuit Judge, dissented when the petition for rehearing was disposed of) said:

"The Cooperage Company entered into the transaction with the Brewing Company for the sale to the latter of the chip tanks, as we gather from the record, with both actual and constructive notice of the existence of the deed of trust, and with this knowledge furnished the tanks and permitted them to become a part of the freehold. The money derived from the sale of the bonds was used, as appears, in the construction and equipment of the brewery."

And it is then said, quoting from *Tippett vs. Barham*:

"We think this latter doctrine announces the correct principle, especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after-acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and received in contemplation of such accessions. In such cases the equities of the bene-

ficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or a legal title intervenes."

But the view that money was derived from the sale of the bonds and applied to the construction and equipment of the brewery, is widely variant from the uncontroverted facts appearing in this record. The evidence shows, without contradiction, that *the bonds were not sold to raise money for the construction or equipment of the brewery, and that no money derived from any sale thereof was applied to such construction or equipment.* The bonds, together with certain stock of the Brewing Company, were issued to Bollinger Bros., after the construction and equipment of the brewery had been completed by Bollinger Bros., with the exception of the installation of one ice machine, the steel chip tanks, "and a few other small things." From the supply of the ice machine, chip tanks, "and a few other small things" Bollinger Bros. were released in a settlement made after the residue of their contract had been performed, and in this settlement the bonds and stock were issued with an allowance to the Brewing Co. by reason of the failure to supply the omitted equipment. The very reason for this settlement was the lack of funds on the part of the Brewing Co. And it was because of the lack of funds that Bollinger Bros. refused to supply the tanks, and brought the petitioner and the Brewing Co. into direct relations with each other. And from its previous relations with the petitioner, involving not only tanks for other breweries, but some of the very tanks now in question, Bollinger Bros. knew that the petitioner would

reserve title to the tanks supplied by it, to secure the payment of the price. (Rec., pp. 58, 64, 65, 94, 95, 99-101, 102, 103, 112, 113, 115.)

In conclusion we submit that under the authorities, the petitioner is clearly entitled either to repossess the tanks in question or to receive payment of the purchase money notes therefor. We do not anticipate that this court can deem it consonant with equity and good conscience to deny this relief, and permit the respondents to retain this property without payment therefor. We respectfully ask the decree of the Circuit Court and the judgment of the Circuit Court of Appeals may be reversed.

Respectfully submitted,

ORLA B. TAYLOR,
CHARLES N. KIMBALL,
WALTER S. SUGDEN,
GEORGE M. HOFFHEIMER,
Counsel for Petitioner.

5
Office of the Clerk, U. S.

FILED

APR 9 1914

JAMES D. MAHER

CLERK

Supreme Court of the United States

No. 368 OCTOBER TERM, 1913.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,

vs.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS,
R. H. SKAGGS, F. HOGENMILLER, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS.

ARLEN G. SWIGER,
THOMAS P. JACOBS,
Counsel.

TABLE OF CASES CITED.

—B—

	PAGES
Branch vs. Jesup, 106 U. S., 478; 27 L. Ed., 279.....	44
Bronson on Fixtures, sec. 19, p. 91.....	19, 21
Brown vs. Haynes, 52 Me., 580.....	58

—C—

Carleton vs. Sumner, 4 Pick., 516.....	60
Chapman & Schoolcraft vs. Lathrop, 6 Cowen, 110	56
Clark vs. Owen, 15 Gray, 522.....	39
"Cyc.", vol. 35, p. 673.....	54
Code of W. Va., sec. 3831, chap. 74.....	8

—D—

Dunham vs. Railway Co., 1 Wall., 254.....	36
---	----

—E—

Ege vs. Kille, 84 Penna., 333.....	26
Equitable Trust Co. vs. Christ, et al., 47 Fed.....	25
Evans vs. Kister, et al., 92 Fed., 827.....	36, 46
Everett vs. Hall, 67 Me., 498.....	58
Ewell on Fixtures, 415.....	19

—F—

Farlow vs. Ellis, 15 Gray, 232.....	59, 60
Farrar vs. Stackpole, 19 Am. Dec., 201.....	26, 28, 31
Fosdick vs. Schall, 99 U. S., 235.....	46, 48
Frat vs. Whittier, 59 Cal., 126 S. C.; 41 Am. Rep., 255	26
Furniss, et al. vs. Hone, et al., 8 Wend., 247.....	57, 60

—G—		PAGES
Gray vs. Holdship, 17 Serg. & R., 415; 17 Am. Dec., 680		31
Green vs. Phillips, 26 Gratt., 752.....		18
—H—		
Hammett vs. Linneman, 48 N. Y., 399.....		60
Haskins vs. Warren, 115 Mass., 533.....		59
Hunt vs. Bay State Iron Co., 97 Mass., 279....	22, 38, 41	
—I—		
In re Tatum (D. C.), 110 Fed., 519.....		47
In re Williamsburg Knitting Mill, 190 Fed., 871..		49
—L—		
Lawton vs. Lawton, 1 H. B., 259.....		31
Lazear vs. Foundry Co., 65 W. Va., 105....	13, 19, 24, 37	
Lorraine Steel Co. vs. Norfolk, etc., R. R. Co., 187 Mass., 500		38
Lupin, et al. vs. Marie & Varet, 6 Wend., 77.....		57
—M—		
Manufacturing Co. vs. Waterston, 3 Mete., 18....		60
Matthews, et al. vs. Smith, 31 At. Rep., 879.....		57
McFadden vs. Crawford, 36 W. Va., 671.....		16
Meagher vs. Hayes, 152 Mass., 228.....		42
Moore vs. Patton, 16 W. Va., 428.....	15, 18	
Myer vs. Car Co., 102 U. S., 1.....	46, 48	
—N—		
New Orleans R. R. Co. vs. Mellen, trustee, & U. S., 12 Wall., 362-265		25
New York Security Co. vs. Capital R. R. Co., 77 Fed., 529		22

—P—

	PAGES
Paul vs. Reed, 52 N. H., 138.....	59
Peabody, et al. vs. Maguire, 12 At. Rep., 631.....	57
Pennock vs. Coe, 23 How., 117; 16 L. Ed., 436.....	44
Phoenix Iron Works vs. N. Y. Security & Trust Co., 83 Fed., 757.....	34, 39
Porter vs. Pittsburg Steel Co., 122 U. S., 267-283..	
.....	23, 36, 39, 47

—R—

Railroad Co. vs. Cowdrey, 11 Wall., 459....	36, 44, 47, 48
Richardson vs. Cokeland, 6 Gray, 536; 66 Am. Dec., 424	39

—S—

Seed vs. Lord, 66 Me., 580.....	58, 60
Shelton vs. Ficklin, 32 Gratt., 727.....	18
Smith vs. Altick, 24 Ohio, 369.....	25
Smith vs. Dennie, 6 Pick., 262.....	60
Smith vs. Lynes, 5 N. Y., 43.....	60
Stone vs. Perry, 60 Me., 50.....	58, 60

—T—

Thompson vs. R. R. Co., 132 U. S., 68; 10 Sup. Ct., 29	36, 44
Tippett & Wood vs. Barham, 180 Fed., 76, C. C. A. 430	22, 37, 43, 45, 52, 53
Toledo, etc., R. R. Co. vs. Hamilton, 134 U. S., 296-302	24, 36
Triplett vs. Mays, 13 Ky., (Law Rep.).....	26

—U—

Union Trust Co. vs. Southern Sawmills & Lumber Co., 166 Fed., 193.....	22, 45, 52
---	------------

	PAGES
U. S. vs. New Orleans & O. R. Co., 12 Wall., 362....	
.....	39, 46, 48
Upton vs. Cotton Mills, 111 Mass., 446.....	59
—W—	
Walker vs. Sherman, 20 Wend., 636.....	27
Watertown, etc., Co. vs. Davis, 5 Houst., 192.....	38
West vs. Platt, 127 Mass., 373.....	59
Westinghouse, etc., vs. Kansas City R. R., 137	
Fed., 40, 41 C. C. A., 1.....	47
Whitney vs. Eaton, 15 Gray, 255.....	58
Wolford vs. Baxter, 33 Minn., 12; 53 Am. Rep., 1..	25
—Y—	
York Manufacturing Co. vs. Cassell, 201 U. S., 344	
.....	46, 48, 49

INDEX.

ARGUMENT—

Brewery not a brewery without tanks.....	19
Case at bar discussed by Mr. Justice Boyd.....	16
Case of Moore vs. Patton discussed.....	15, 16
Case of McFadden vs. Crawford discussed.....	16, 17
Case of Porter vs. Pittsburg Steel Co. discussed	23, 24
Chip tanks necessary for the purposes for	
which they were used.....	17
Conditional sale law of W. Va. discussed.....	15
Contention of Respondents.....	13
Criterion of annexation discussed.....	19, 20
Doctrine applicable to property furnished for	
original construction discussed.....	23

	PAGES
Federal Court will follow State decisions.....	13
Law of Lazear case discussed.....	13, 14, 37
Massachusetts Rule	21, 22, 23, 38, 43
New York Rule	21
Requisites and tests of a fixture.....	21
Rule in case of <i>Frat vs. Whittier</i>	
.....	26, 27, 28, 29, 30, 31, 32
Rule in case of <i>Toledo R. R. Co. vs. Hamilton</i>	24, 25
True Rule for determining what are fixtures, etc.	18, 19

BRIEF OF ARGUMENT—

Respondents' contention No. 1.....	11
Respondents' contention No. 2.....	11
Respondents' contention No. 3.....	11
Respondents' contention No. 4.....	12
Two questions presented by Record.....	12

INTRODUCTION—

After acquired property clause stated.....	10
Case involves interpretation of language of statute	10
Condition on which tanks can be removed.....	10
Contention of Petitioner.....	9, 10
Contention of Respondents.....	10
History of statute stated.....	10
Petitioner had actual and constructive notice of Respondents' mortgage.....	10
Petitioner installed tanks in brewery.....	10
Statute Law of W. Va., chap. 74, sec. 3831.....	8, 9
Statute refers solely to personal property.....	10
Tanks become part of real estate.....	10

PROPOSITION No. 1—	PAGES
Brewery could not be operated without tanks....	36
Case of Phoenix Iron Works vs. N. Y. Security & Trust Co., discussed.....	34, 35, 36
Petitioner estopped from asserting their rights	33
Respondents' innocent bondholders.....	34
Tanks placed in brewery by Petitioner, with actual and constructive notice of mortgage....	33, 34
 PROPOSITION No. 2—	
After acquired property clause in mortgage	44, 51, 52
Bondholders cannot be affected by mortgage between Brewing Co. and Petitioner.....	42
Case of Tippet & Wood vs. Barham discussed	37, 45, 53
Case of Union Trust Co., et al. vs. Southern Sawmills & Lumber Co., et al., discussed.....	45, 46
Case of Williamsburg Knitting Mill discussed	49, 50, 51, 52
Machinery which the seller knew would become a fixture subject to lien of prior mortgage.....	38, 39
Mortgage executed and recorded more than a year before tanks were furnished.....	40
Mortgagees purchased bonds contemplating future acquisition of tanks.....	42
Mortgagor in possession not competent to bind existing mortgagee	38
Petitioner knew tanks would become an in- tegral part of plant.....	41
Petitioner's lien, if any, waived.....	54, 55, 56, 57, 58, 59, 60
Question of character of attachment of fixture plays no part under modern rule.....	41, 42
Removal and circumstances under which tanks were placed in brewery.....	40, 41

PAGES

Respondents own the bonds secured by first mortgage	39, 40
Rights of mortgagee cannot be affected by agreement between seller and mortgagor.....	37
Rule in case of Evans vs. Kister discussed....	46, 47, 48
Rule in case of U. S. vs. Railroad Co. discussed	48, 49
Several bids received for brewery, tanks, etc....	53, 54
Question of Parties.....	61

STATEMENT—

Bill filed by Respondents.....	4
Bill filed by Petitioner.....	6
Bids Received by Receiver at Sale.....	7
Conditional Sale of Tanks.....	3
Cause Referred to Master.....	5
Decree of Sale.....	5
Modified	6, 7
Mortgage of Brewing Co.....	2
Recorded	2
Prayer to Respondents Bill.....	4
Petitioner's Bill Dismissed.....	7
Petitioner's Appeal to United States Circuit Court	8
Petitioner's Application for Re-hearing.....	8
Real Estate Owned by Brewing Co.....	1, 2
Receiver Appointed	5
Qualified	5
Receiver's Notice of Sale.....	5, 6
Receiver's Sale Confirmed	7
Sistersville Brewing Company, incorporated..	1
Trustee in Trust Mortgage Resigns.....	7

Supreme Court of the United States

No. 368 OCTOBER TERM, 1913.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,

vs.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS,
R. H. SKAGGS, F. HOGENMILLER, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.

Statement of Case.

The Sistersville Brewing Company was incorporated by and under the laws of the State of West Virginia, on the 31st day of December, 1904, for the purpose of manufacturing porter, ale, beer, etc., and selling the same at wholesale. Its principal office, place of business and plant is located in the City of Sistersville, Tyler County, West Virginia.

The said Brewing Company was the owner of a certain tract or parcel of land containing .741 of an

acre, together with a certain building, fixtures, appliances and other property, constituting a valuable property, located and situated as mentioned above.

About the first day of December, 1906, the said Brewing Company executed and conveyed to John S. Sell, trustee (by the name and description of John S. Sell, cashier of Westmoreland National Bank, of Greensburgh, Pennsylvania, trustee), a certain deed of trust in the nature of a mortgage, which deed of trust recited the intention of the said Brewing Company to issue its eighty bonds for the aggregate principal sum of forty thousand dollars, and each for the sum of five hundred dollars, bearing date the 1st day of December, 1906, with interest payable semi-annually, to be issued in seven series, of which the first series included ten bonds of the aggregate principal sum of five thousand dollars, to become due and payable on the first day of December, 1909, and the remaining series were to become due and payable on subsequent dates therein specified. By said deed of trust said Brewing Company conveyed to said John S. Sell, as trustee, said tract or parcel of land hereinbefore mentioned, together with the brewery buildings, machinery and appliances thereon erected or *to be erected*, with all the appurtenances thereto belonging or in any wise appertaining, together with the corporate rights and privileges of the said Brewing Company for the use, benefit and security, as therein mentioned, of the persons who may become the holders of said bonds intended to be thereby secured, or any of them, without preference, priority or distinction whatever.

The said deed of trust was recorded in the office of the clerk of the county court of Tyler County, on the 21st day of February, 1907, in Deed of Trust Book No.

13, page 7, prior to the making of the agreement between the above mentioned Detroit Steel Cooperage Company and the Sistersville Brewing Company for the construction, furnishing and erection of tanks and fixtures, as is more fully set out by a certified copy of the said agreement filed in this cause.

On the 8th day of August, 1908, by an agreement in writing made and entered into by and between the said Brewing Company and the Detroit Steel Cooperage Company, the said Cooperage Company agreed to construct and furnish to said Brewing Company and to erect in said brewery thirteen chip casks or tanks. And in consideration thereof said Brewing Company in and by said agreement in writing agreed to pay said Cooperage Company the sum of \$5,480.00, of which the sum of \$2,000.00 was to be paid when all the tanks had been shipped, and a further sum of \$740.00 was to be paid when the tanks, fixtures and fittings were erected at the brewery and tested, and for the further sum of \$2,740.00 said Brewing Company was to execute a promissory note payable three months from date, with interest at the rate of six per cent. per annum.

And it was agreed by said agreement in writing by and between the said Brewing Company and the said Cooperage Company, that the title and ownership of all the tanks and fixtures covered by said agreement should remain in the said Cooperage Company until the payments therein specified should have been fully paid, and in case of default in any of said payments the said Cooperage Company should have the right at its option to take possession of and remove the said tanks and fixtures. According to the terms of said agreement, the said Detroit Steel Cooperage Company did construct and furnish to said Brewing Company the said tanks and fixtures as mentioned above.

On the 9th day of April, 1909, George W. Hartman, Bollinger Brothers and others, filed their bill in the Circuit Court of the United States for the Northern District of West Virginia against Sistersville Brewing Company and others, in and by which bill said Bollinger Bros. and others alleged in substance, among other things, that they were the holders and owners of a majority of the bonds secured by said deed of trust executed to said Sell as trustee; that said Sell, trustee, had failed and refused, and still failed and refused, to act as trustee under said deed of trust, although requested in writing so to do; that no other trustee had been appointed in the place of said Sell; that said Brewing Company had made default in its obligations under said deed of trust and was insolvent; that said Brewing Company had made default in the payment of taxes on its brewery, and that its property had been levied upon by the said City of Sistersville for taxes due and unpaid, and that numerous creditors had executions issued on judgments which they had recovered against the said Brewing Company; that a receiver should be appointed of and for the property of said Brewing Company.

The said Hartman, Bollinger Bros. and others, prayed that said execution creditors, the sheriff of Tyler County and others, might be restrained from selling or offering for sale the property levied upon; that said deed of trust executed to said Sell, as trustee, might be foreclosed, and that the liens of all parties holding liens upon said property might be ascertained, and that the property might be sold for the purpose of paying off and discharging the liens; that a receiver be appointed to take charge of said Brewing Company's property, and that the said complainants might have such relief, both general and special, as the necessities of their case may require.

On the 17th day of April, 1909, upon the petition of said Hartman, Bollinger Bros. and others, the Court appointed J. Hanford McCoy, receiver of the plant and property covered by said deed of trust, executed to said Sell as trustee, including all the property, both real and personal, in the City of Sistersville, belonging to said Brewing Company, together with the stock on hand.

Thereupon the said J. Hanford McCoy duly qualified as such receiver, and entered upon and took possession of all the property of said Brewing Company, and still is acting as such receiver.

On the 30th day of October, 1909, a decree of sale and reference was entered in the said cause, in and by which it was adjudged, ordered and decreed that said J. Hanford McCoy, as receiver, sell at public auction, at the front door of the brewery, all the property of said Brewing Company situate in the said City of Sistersville, consisting of said tract or parcel of land, together with the buildings of all kinds and the structures thereon erected, and the machinery, fixtures, appliances, implements, appurtenances, etc.

Said cause was referred to George E. Boyd, master, to report the amount of the bonded and mortgaged indebtedness of said Brewing Company, the parties to whom due, and the amounts due them, respectively, all the names of the stockholders of said Brewing Company and the amount of stock owned by each stockholder, and all other indebtedness of said Brewing Company.

J. Hanford McCoy, as receiver, by virtue of authority conferred by said decree, published notice that on Saturday, the 11th day of December, 1909, at two o'clock in the afternoon, he would offer for sale at public action, at the front door of said Brewing Company's plant, in said City of Sistersville, for cash in hand on day of

sale, said tract or parcel of land, together with the brewery building, office bottling houses, cooperage, fixtures, etc.

On the 23rd day of December, 1909, Detroit Steel Cooperage Company, by Charles N. Kimball and George M. Hoffheimer, its counsel, tendered and filed its bill of complaint, and moved for preliminary or provisional injunction enjoining J. Hanford McCoy, in his own right and as receiver of the Sistersville Brewing Company, from selling, or offering or attempting to sell, under the decree of said court entered on the 3rd day of October, 1909, the tanks, fixtures and fittings or any of them, constructed and furnished by said Cooperage Company, and from retaining or attempting to retain possession and control of said tanks and fixtures, and from bringing on or prosecuting the reference to said George E. Boyd, master. The said motion was argued by counsel, and the court took time to consider the same, and the said Hartman, Bollinger Bros., Sistersville Brewing Company, J. Hanford McCoy, in his own right and as receiver, were given leave to answer said bill within forty-five days.

It was further ordered that until the confirmation of the report of sale the reference under the decree entered on the 30th day of October, 1909, be stayed. At the same time it was ordered that the decree of sale heretofore entered be modified as follows:

"The said receiver, J. Hanford McCoy, is directed to offer and receive bids on the Brewing Company plant exclusive of the tanks, fixtures and fittings erected in said plant by Detroit Steel Cooperage Company, and mentioned in the agreement of record in the office of the clerk of the County Court of Tyler County, West Virginia, in Deed of Trust

Book No. 13, page 341, separately; and, also, to offer and receive bids on said tanks, fixtures and fittings separately; and, also, shall offer the plant as a whole and receive bids thereon, and in any case report his bids to the Court."

At the same time John S. Sell, the trustee in the trust mortgage mentioned above, filed his resignation as such trustee.

On the 27th day of December, 1909, in pursuance of said modified decree of sale, J. Hanford McCoy, receiver, offered the plant of the said Sistersville Brewing Company for sale, without the tanks erected therein by said Detroit Steel Cooperage Company, and received as the highest and best bid for said plant, without said tanks, a bid of \$4,000.00.

Said receiver then offered for sale the tanks, fixtures and fittings erected in said plant by the Detroit Steel Cooperage Company separately, and received a bid of \$500.00 for the same. The said receiver then offered the plant as a whole, and the highest and best bid received therefor was \$10,000.00. The bidders were S. W. Bollinger, Franklin P. Iams and A. H. Oyer of Pittsburgh, Pennsylvania.

The sale made by the said receiver, J. Hanford McCoy, to the said Bollinger, Iams and Oyer, for the sum of \$10,000.00, was at a later date confirmed by the Court, and at the same time the reference to George E. Boyd, master, was stayed until the matters in controversy in the cause of Detroit Steel Cooperage Company against Sistersville Brewing Company and others were ended.

On the 17th of October, 1911, the said court entered a decree dismissing the complainant's bill for want of equity, and adjudged costs of suit against the complainant.

Thereupon the Detroit Steel Cooperage Company appealed the said cause to the United States Circuit Court of Appeals for the Fourth Circuit, where, after due argument and consideration, the decree entered by the District Court of the United States for the Northern District of West Virginia was confirmed, as will appear by pages 244 and following of the Record.

Thereupon the Detroit Steel Cooperage Company applied to the said United States Circuit of Appeals for the Fourth Circuit for rehearing, which by the said Court was refused; and the said Detroit Steel Cooperage Company then proceeded to obtain a *Writ of Certiorari* to the United States Circuit Court of Appeals for the said Fourth Circuit.

Introduction.

The complainant and petitioner undertook under statute of West Virginia, section 3831, chapter 74 of the Code of West Virginia, to reserve the title to said tanks until the Brewing Company should have paid the purchase price for the same. The language of said statute is as follows:

“Where any loan of goods or chattels is pretended to have been made to any person with whom, or those claiming under him, possession shall have remained five years without demand made and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation is pretended to have been made of a use or property, by way of condition, reversion, re-

mainder, or otherwise, in goods or chattels, the possession whereof shall have so remained in another as aforesaid, the absolute property shall be taken to be with the possession, and such loan, reservation or limitation, void as to creditors of, and purchasers from, the person so remaining in possession, unless such loan, reservation, or limitation, be declared by will, deed or other writing, duly recorded. And if any sale be made of goods and chattels, reserving the title until the same is paid for, or otherwise, and possession be delivered to the buyer, such reservation shall be void as to creditors of, and purchasers without notice from, such buyer, unless a notice of such reservation be recorded in the office of the clerk of the county court of the county where the property is or in case said goods and chattels consist of engines, cars or other rolling stock or equipment to be used in or about the operation of any railroad, unless such notice be recorded in the office of the secretary of state, who in such case shall record the same in a book to be kept for the purpose, and be entitled to a fee of five dollars for so doing."

We contend that under the statute just above cited that the attempted reservation of title can not avail petitioner. The mortgage had been on record for more than a year at the time the Cooperage Company furnished the tanks, and said company furnished said tanks with notice both actual and constructive that the defendants were claimants under a valid mortgage. The Cooperage Company now insists upon the right to remove said chip tanks, or cooperage, and to that extent dismantle and destroy the integrity of the brewing

plant; and they have taken much evidence, the tendency of which is to show, if it shows anything, that the cooperage can be removed without injury to the structure of the building.

On the part of the respondents it is contended that the cooperage can not be removed from the brewery building under any circumstances, regardless of the question whether the removal would injure the structure or not. As has been heretofore intimated, the brewery without the chip tanks is absolutely no brewery at all, and without those chip tanks, or some other chip tanks, beer could not be manufactured.

Whether those tanks can be removed or not depends upon two or three considerations: First, the chip tanks are fixtures and belong to the brewery, and are not susceptible of being removed, whatever attempt the cooperage company may have made to reserve title. Second, the case involves the interpretation of the language of the statute heretofore recited. We insist, on behalf of the respondents that the statute referred to was enacted solely for the purpose of securing liens and charges upon purely personal property. The history of this statute as it exists from its first inception in Virginia, and its continuation in the State of West Virginia, will show that real estate was not in contemplation, but that it was enacted purely for the purpose as aforesaid, for securing liens upon personal property. And especially is this true in view of the fact that the Detroit Steel Cooperage Company permitted said cooperage, or said tanks, to be installed within the brewery building with notice both actual and constructive of the existence of said prior mortgage, which contained a clause providing for its operation upon after acquired property; and also in view of the fact that the said Detroit Steel

Cooperage Company, in fact, by its own employees installed said cooperage in said Brewery Company's building, thereby consenting that the said cooperage, although at one time personal property, became real estate and an integral part of the plant and thereby waived, surrendered in effect, and lost their attempted reservation of lien or title upon said tanks or cooperage.

Brief of the Argument.

The Respondents Contend:

1. That the chip tanks or cooperage are fixtures and belong to the brewery and are not susceptible of being removed, whatever attempt the Detroit Steel Cooperage Company may have made to reserve title.

2. The case involves the interpretation of the statute heretofore recited and found in chapter 74 of the Code of West Virginia, section 3831.

3. The statute referred to was enacted solely for the purpose of securing liens and charges upon purely personal property. The history of this statute as it exists from its first inception in Virginia, and its continuation in West Virginia, will show that real estate was not in contemplation, but that said statute was enacted purely for the purpose as aforesaid, for securing liens upon goods and chattels, or the title thereto, until paid for.

4. Mr. Justice Boyd, a member of the United States Circuit Court of Appeals, when he delivered the opinion in this case in that Court said :

“There are two questions presented by the record which become necessary for us to determine. The first is, whether the tanks referred to are fixtures, and, second, if they are held to be fixtures, does the reservation of title in the contract between the Cooperage Company and the Brewing Company as secured for the purchase money entitle the vendor to retake the tanks or to have a preference over the lien of the bondholders for the unpaid balance of the purchase price in the distribution of the proceeds of the sale of the brewery.”

Argument.

IT IS CONTENDED ON THE PART OF THE RESPONDENTS THAT THE COOPERAGE OR TANKS CAN NOT BE REMOVED FROM THE BREWERY UNDER ANY CIRCUMSTANCES, REGARDLESS OF THE QUESTION WHETHER THE REMOVAL WOULD INJURE THE STRUCTURE OR NOT; AND WHETHER THEY CAN BE REMOVED OR NOT WITHOUT INJURY TO THE BUILDING IS NOT DETERMINATIVE OF THE ISSUES IN THIS CASE.

We suggest and insist that where a cause comes from any given State to this Court, that this Court in general will follow the decisions of the court of last resort in said State, especially where it relates to the title to property real or personal and as in this case depends largely upon the construction or interpretation of a statute by a court of highest resort in that State; the Supreme Court of the United States will, in general, be governed by the interpretation and decisions of the local court.

In the case of *Lazear vs. Foundry Company*, 65 W. Va., 105, the statute above cited is discussed, and its force and effect, as well as its scope and purpose, are settled by the Supreme Court of Appeals of West Virginia as fully as the same can be settled, and this being a case arising under the law of the State of West Virginia relating to property and property rights, we regard said cause as being controlling in this case. On page

111 of the opinion in that case the court, in a few lines, lays down the purpose and meaning of that statute in the following language :

“With respect to the position of appellants, it is quite true that the statute gives right of reservation of title to goods and chattels sold, as security for unpaid purchase money; but that statute has strict application to goods and chattels.”

In that case the claimant furnished certain machinery to the Steel Foundry Company at Padon City, which machinery was but slightly attached to the real estate and could be detached by the unscrewing of a couple of screw taps. The title had been reserved by the parties furnishing the machinery under the above statute, but in said case not only the Circuit Court but the Supreme Court of Appeals of West Virginia declined to allow the machinery to be detached, holding that to do so would be to destroy the integrity of the plant. In that case there were no walls to enclose said machinery, and it would, therefore, not have been necessary to tear down or dismantle any walls for the purpose of removing the same. Said machinery stood in the open, covered simply by a roof; said building being one with no sides to it, and simply maintained by iron supports. In that case, as well as the case at bar, the machinery furnished by the claimants and on which reservation of title was had, constituted the chief value of the Steel Foundry Company, and without that machinery the worth of the plant would have been measured by a heap of scrap iron and the real estate on which it stood. The machinery furnished the whole value to the Foundry Company, and made it a going concern. The opinion in that case is referred to as being the leading case in the State of West Virginia on the subject.

We prefer from this time forth to discuss the law rather than discuss the facts. The vital facts lie within a narrow compass, and are easily gathered by the court from the statement already made, and further from the opinion of the Circuit Court of Appeals of the United States. We shall, therefore, from this point on, take up a few only of the well considered cases both in the state and federal courts to sustain our position.

We have said, and we repeat, that the statute above cited, under which the petitioner claims the right to reserve title to the tanks and to remove the same was intended strictly, wholly and solely to apply to personal property, and goods and chattels, and to furnish a lien or charge thereon, and does not take within its scope real estate in any sense, and the moment that personal property is carried on mortgaged premises with the intention of installing the same as a part of a plant, the mortgage opens up to receive the same as a part of its subject matter, and that which was theretofore personal property loses its character as personal property, and any attempt to retain title thereto is divested by reason of the fact—by placing machinery or otherwise in the plant. This doctrine is well illustrated in numerous cases; and this fact is re-inforced by the further fact that the mortgage referred to, and which was duly of record for more than a year before the tanks were furnished, contained a clause within it providing for its application to and operation upon after acquired property.

In the case of *Moore vs. Patton*, 16 W. Va., 428, the facts in brief were these:

The defendant had purchased certain machinery to be installed in his flouring mill then being erected, and

had also hauled upon the grounds certain buhrs to be used in the mill, none of which had been attached to his real estate. While lying in this condition on the ground a creditor caused an execution to be levied on the property as personal property. The Supreme Court in this case sustained an injunction against the execution of the lien, holding that the machinery and buhrs although not placed in the mill were part of the mill, and a substantial part, and should not and could not be removed from the premises.

Mr. Justice Boyd, in the decision of the case at bar, cites approvingly this case, and quotes therefrom in the following language:

"The true rule in determining what are fixtures in manufacturing establishments where the land and buildings are owned by the manufacturer is, that where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, must be regarded as realty and it passes with the building; and whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either."

In the case of *McFadden vs. Crawford*, 36 W. Va., 671, a rolling mill company was operating its rolling mill on a three-acre tract of land, and had purchased two large pieces of machinery known as railroad spike machines for the purpose of attaching them to the mill and to manufacture spikes with them. It had brought said machines on a car which was standing on a railroad switch belonging to the rolling mill company, near said

mill, on said lot, one of which machines was unloaded and the other still on the car, and the foundations of said rolling mill had been prepared to receive said machines; and while in this condition they were levied upon under an attachment and sold as personalty. In this case the Supreme Court of Appeals of West Virginia held that "said machines were a part of the realty of said rolling mill company, and could not be levied on and sold as personalty."

The court therefore further held, that not being personalty, "An action of detinue for the recovery of said machines could not be maintained by the purchaser of said machines under an attachment levied on them as personalty, for the reason that under the facts shown they must have been regarded as part of the realty," although not yet attached. The same court also held in that case that the machines having been brought by the owner of the rolling mill and placed upon the mill lot with the *bona fide* intention of attaching them to the mill, although not yet actually attached thereto, they being necessary for the purpose for which they were to be used, they must be regarded as part of the realty, and not liable to be levied upon and sold as personalty, and being fixtures, were not liable to be removed.

We may add, that the chip tanks being necessary for the purposes for which they were to be used, they must be regarded as part of the realty, and not liable to be levied upon as personalty and not liable to be removed. In this case the said tanks were actually placed in the building and the opening through which they had been carried was fully walled up, and the tanks installed as an integral part of the brewery, and without which there could have been no brewery.

The true rule for determining what are fixtures which can not be removed from the manufacturing plant is laid down in the case of *Patton vs. Moore*, *supra*; cited also by Judge Boyd in his opinion:

“The true rule in determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer, is, that where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty and passes with the building; and whatever is essential to the purposes of which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either.”

To the same effect is the case of *Green vs. Phillips*, 26 Grat. (Va.), 752, where it is likewise held that:

“The true rule in determining what are fixtures in a manufacturing establishment where the land and buildings are owned by the manufacturer, is, that where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either.”

Likewise to the same effect is the case of *Shelton vs. Ficklin*, 32 Grat. (Va.), 727, which we cite without quoting from.

These cases coming from the States of Virginia and West Virginia sustain the text as laid down in *Ewell on Firtures*, page 415, and all go to show that when one has sold machinery and property to be placed in a manufacturing plant and to become part thereof, the moment the same is placed in said plant its character as personalty absolutely ceases, and it becomes part of the realty as much as the land upon which the said plant is situate, and this too regardless of the fact that an attempt may have been made to retain title or that a lien may already have existed on said personalty.

On this subject Judge Miller, in the case of *Lazcar vs. Foundry Company*, *supra*, expressly put this interpretation on the act, on page 111 of that case, where he says:

"It is quite true that the statute gives reservation of title to goods and chattels sold as security for unpaid purchase money, but that statute has strict application to goods and chattels."

The evidence in this case supports the theory of both parties, that a brewery is not a brewery without tanks, and that it cannot be conducted as such without tanks. We have already laid down the proposition which we think is supported by all the authorities, that the question whether a party has the right to remove tanks from a brewery or not does not depend upon any physical question whatever, but depends upon one question, whether the tanks are necessary for the use of the brewery and to maintain and keep the integrity of the same as such.

Bronson on Firtures, page 91, section 19, says:

"The criterion of annexation as a sole test in determining the character of a chattel, or as a

test in arriving at the intention of the parties, early becomes inadequate. The question whether a chattel is annexed or not is often exceedingly dubitable, and one wherein many fine distinctions may be drawn. With this as a sole test it is necessary to consider every chattel a fixture that is affixed to the slightest degree. But this is plainly inefficient for the reason that there are many cases, especially in respect to the machinery, where there is a little or no fastening of the chattel to the freehold, as where light machinery is connected by belting in a mill, or where a bucket is hung in a well. So, where the essential parts of some machine are temporarily severed for purposes of repair, or where there are duplicate sets not attached, but adapted to the use of the realty, in these cases the test of annexation would prove fruitless and abortive in arriving at the true character of the chattel. Hence, there has arisen another test—that of adaptation of the chattel to the use of the freehold—which, in recent years has been frequently applied. Pennsylvania, perhaps, has given this test its strongest effect by treating it, in some cases, as an only consideration in determining the character of the chattel; but, as a sole test, it is equally as ineffective as the test of annexation, for the reason that there are many articles of furniture and others of a purely personal nature which are useful, convenient, and adapted to the pursuit of a particular trade or business, yet they can in no way be classed as fixtures. And the same might be said in respect to domestic animals and the necessary utensils of a farm."

In the last quoted authority, *Bronson on Fixtures*, chapter 3, section 20 a, under the head of Requisites and Tests of a Fixture, the following language is used:

"The true rule in this connection, as laid down by the Supreme Court of Virginia, seems to be that when the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty and passes with the building, and that whatever is essential for the purpose for which the building is used will be considered as an irremovable fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either."

The cases hitherto considered have come from the State in which this litigation arose, and also from the mother State of Virginia, and are regarded as settled law and not to be questioned. We now propose to refer the Court to other cases coming from the Supreme Court of the United States and from certain Federal Decisions, and also from certain other State authorities.

Previous to which, however, we desire to call the attention of the Court to a fact which we believe to be true, that there is in the United States two lines of decisions on the subject matter under discussion. One is generally denominated the "New York Rule," and the other is what is generally known as the "Massachusetts Rule," and has been affirmed by many other courts of last resort and particularly by the Supreme Court of the United States in several cases. This rule, known as the "Massachusetts Rule," not only prevails in the Fourth Judicial Circuit, but also prevails as we have

said in the two States of Virginia and West Virginia. As showing the existence of the so-called "Massachusetts Rule" within the said Fourth Judicial Circuit we cite the following cases:

Union Trust Co. vs. Southern Sawmill & Lumber Co., 166 Fed. Rep., 193.

Tippett & Wood vs. Barham, 180 Fed. Rep., 76 C. C. A., 430.

To a similar effect is the following case, *New York Security Company vs. Capital Railroad Company*, 77 Fed. Rep., 529:

"Where chattels are sold under an agreement that the title shall not pass until payment, and are delivered to the purchaser after he has made a mortgage covering after acquired property, of which mortgage the vendor had constructive notice through its record, the vendor's lien on said chattels for their price will prevail as against the mortgage provided said chattels are separate and distinct personalty and do not become a part of the real estate mortgaged; but if with the consent of the vendor implied by his knowledge of the mortgage such chattels become part of the realty, they are subject to the lien of the mortgage."

We pause for a sufficient time to emphasize the fact that the "Massachusetts Rule" is prevalent and recognized as the law, as has been before suggested, in the Jurisdiction from which this litigation arose, and we take it that the Court is thoroughly familiar with the holding of the Massachusetts Supreme Court; but, to save the Court labor we cite the case of *Hunt vs. The Iron Co.*, 97 Mass., 279, where the Supreme Court of

Massachusetts makes a clear distinction between that which is to remain in the form of goods and chattels, and that which becomes a part of the real estate, and that too without regard to the fact of whether it is physically annexed or attached to the real estate or whether it is held in place by gravity.

In this case last cited, there is also a plain and marked distinction made between the Massachusetts line of decisions and that line of decisions headed by the New York Court of Appeals.

The doctrine applicable to property furnished for original construction is recognized in the case of *Porter vs. Pittsburg Steel Company*, 122 U. S. Rep., 267-283. In the Porter case just cited, the claimants had furnished a bridge to complete a railroad, and had reserved in the contract the title to the bridge until the same was paid for. Justice Blatchford in delivering the opinion of the Court says:

"Whatever is the rule applicable to locomotives and cars and loose property susceptible of separate ownership and separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after acquired property, it is well settled in the decisions of this court that rails and other articles which become fixes to and a part of the railroad covered by a prior mortgage will be held by the lien of such mortgage (prior) and in favor of the *bona fide* creditors as against any contract between the furnisher of the property and the railroad company containing stipulations like those in the contracts in the present case."

As insisted upon and argued by counsel for petitioner, it was just as possible in the Porter case to have removed the rails and bridge and other parts of the property in connection therewith from a legal standpoint as it would be to remove the chip tanks in controversy in this case, with this exception, that in the present case it would be necessary not only to tear down a wall or walls, but also by the removal of the chip tanks to destroy the integrity of the plant and make it no longer a brewery plant.

In the case of *Toledo, etc., Railroad Company vs. Hamilton*, 134 U. S., 296-302, the same doctrine was held valid; and this doctrine is applicable in the State of West Virginia to other classes of property, as well as to railroad properties, as will be seen by a recurrence to the case of *Lazear vs. Steel Foundry Company, supra*.

In the case of *Toledo Railroad Company vs. Hamilton*, 134 U. S. Rep., 296, the syllabus holds as follows:

"(1) Where a railroad company executed a mortgage on its present and after acquired property to secure its bonds, and thereafter a contractor with the company erected a dock for the company on the part of the property covered by the mortgage and filed a mechanic's lien for his pay, he is not entitled to priority of payment over the mortgage."

"(2) A recorded mortgage given by a railroad company on its road bed and other property cannot be displaced thereafter, directly by a mortgage given by the company nor indirectly by a contract between the company and a third party for the erection of buildings or other works or original construction."

PROPOSITION.

HAVING SOLD AND DELIVERED THE CHIP TANKS OR CASKS TO THE SISTERSVILLE BREWING COMPANY TO BE ATTACHED TO THE REAL ESTATE ON WHICH SAID REAL ESTATE THE TRUST MORTGAGE GIVEN TO SECURE THE BONDS WAS A FIRST LIEN, AND HAVING PERMITTED THE SAID TANKS OR CASKS TO ENTER INTO AND BECOME A MATERIAL PART OF THE PLANT OF THE SISTERSVILLE BREWING COMPANY, THE DETROIT STEEL COOPERAGE COMPANY IS NOW ESTOPPED FROM ASSERTING ANY RIGHT OR PRIORITY ON THE PROPERTY OR THE PROCEEDS DERIVED FROM THE SALE THEREOF TO THE INJURY OF THE SECURITY OF THE BONDHOLDERS, BUT MUST BE REGARDED AS HAVING WAIVED ITS RIGHTS, IF ANY, AS AGAINST DEFENDANTS' PRIOR LIEN.

We have already asserted this proposition, that the Detroit Steel Cooperage Company having furnished the chip tanks with notice both actual and constructive of the mortgage on the brewery plant, in existence for more than a year, executed to secure a bond issue of more than forty thousand dollars, which bonds were negotiated and had been sold and were in many innocent hands, the attempt of the said company to secure itself by retention of title was non-effective and abortive, and the moment said chip tanks were placed in said brewery they lost their character of personal property and became a part of the realty without regard

to whether they were very substantially fixed or not. And the attempt to reserve title under the statute is without effect as against the prior mortgage. The mortgage opened up and received within its subject matter everything thereafter placed upon the plant, and that, too, without regard to the question whether the attachment was physically very material or not, provided, always, that the property placed upon the plant was reasonably necessary for the uses and purposes of the plant. The petitioner, the Detroit Steel Cooperage Company, having permitted its property to be taken over by the Sistersville Brewing Company did so with full notice of the prior mortgage, and can not be heard to say that its acts were innocent and that it ought to be shielded and protected from the effect of the prior mortgage, especially in view of the fact that the *bona fide* issue of more than forty thousand dollars worth of bonds were already in the current of trade and business, and had passed *bona fide* out of the hands of the original holders, many of them at least, into the hands of innocent holders.

This is a contest, in fact and in effect, between George W. Hartman and Bollinger Brothers, a corporation, who are innocent bond holders and who are entitled to be paid out of the proceeds of the sale of said Brewery Company, and the petitioner.

We cite *Phoenix Iron Works Co. vs. New York Security & Trust Company*, 83 Fed. Rep., 757. This case was appealed from the Circuit Court of the United States for the District of Kentucky; Taft and Lurton Circuit Judges, and Clark District Judge. We quote from it as follows:

"The learned circuit judge rested his decision in the case upon two grounds: First. That the machinery constituting the steam plant and motive power, without which the railroad company could not be operated, became, when furnished, an essential, integral part of the railway system, and being a part of the original construction work, passed directly under the terms of the general mortgage, and that the stipulation in the contract between Whitley and the petitioner, retaining title, was invalid as against the first mortgage. Second. It was further held that a contract of this character, retaining title as security for a debt, is required to be registered, under the recording acts of the State of Kentucky, and that the contract was for this reason invalid as against creditors, including the bondholders whose debts are by this mortgage secured. Either ground on which the judgment was placed, if legally valid, is conclusive of the case, and renders further discussion of the ruling unnecessary. We may remark that this question is not to be determined by any mere technical theory of what does or does not constitute a fixture, in respect to the ordinary real estate mortgage, as between the mortgagor and mortgagee. Nor does the determination of the case depend on any narrow question of mere physical injury to the building in the removal of the machinery placed therein. Decisions in relation to those questions furnish aid, by analogy, in the solution of a problem like the one at bar, but they are not decisive. The property of the railway company, and the uses of the machinery, are different, and this difference in the nature of the property and the uses to which

it is put must be taken into account. The business is, moreover, *quasi* public, and the franchises of this class are granted in the interest of the public. The principle which controls the case and the reasoning applicable, are fully set forth in *Porter vs. Steel Co.*, 120 U. S., 649, 7 Sup. Co., 1206; *Denham vs. Railway Co.*, 1 Wall., 254; *Railroad Co. vs. Hamilton*, 134 U. S., 296, 10 Sup. Ct., 546; *Railroad Company vs. Cowdrey*, 11 Wall., 459; *Thompson vs. Railroad Co.*, 132 U. S., 68, 10 Sup. Ct., 29."

See *Evans vs. Kister, et al.*, 92 Fed. Rep., 836.

So counsel for respondents, in view of the text writers and decided cases, conclude that whenever any machinery intended to go into a permanent plant and upon the real estate, is put into such plant, being machinery or appliances without which the plant could not be operated at all, it acquires the same character as the estate on to which it is put, that is, realty, and loses its character as personalty. And the attempt in this case to assert title to it under an attempted reservation of title results in nothing but a futile attempt to destroy the integrity of the plant. This being true, all the appellant's voluminous evidence in this case tending to show the facility with which the chip tanks could be removed goes for naught. The character of the adhesion to the real estate can not play any part; whether fastened with very strong bolts or clamps or simply set in can play no part. The sole question is whether it was intended to be used as a part of the plant and goes to make up the integrity of the plant. If so, it must remain as a fixture and as a part of the real estate, and can not be removed, and this regardless of the question as to the facility with which it might be removed.

In the case of *Lazcar vs. Steel Foundry Company*, quoted above, the company furnishing the machinery attempted to reserve title. There was no difficulty in removing the machinery; it was not enclosed. There was simply a roof over it, and the unscrewing of two or three lock bolts would have detached entirely the machinery placed in the plant, and it did seem, if ever there was a case where the right of reservation should have been enforced it was in that case, because the claimants furnishing the machinery gave the foundry company all the value it ever did have, before that it being a mere shed with a boiler and engine; and the machinery put in it by the claimants was used solely and purposely for giving the plant efficiency.

PROPOSITION NO. 2.

THE RIGHTS OF THE MORTGAGEE CAN NOT BE AFFECTED BY ANY AGREEMENT, TO WHICH HE IS NOT A PARTY, MADE BETWEEN THE SELLER AND THE MORTGAGOR IN POSSESSION. THE RIGHTS OF THE MORTGAGEE ARE SUPERIOR TO THOSE OF THE SELLER OF THE FIXTURES ATTEMPTING TO RETAIN TITLE.

In *Tippett & Wood vs. Barham*, 37 L. R. A. (N. S.), 130; S. C. 103 C. C. A., 430; S. C. 180 Fed. Rep., 76, the syllabus is as follows:

"A person undertaking to erect a stand pipe as a part of a water works system, which is to be attached to the foundation by bolts imbedded in it,

can not by contract to which the mortgagee is not a party reserve a right to remove it in case of failure to pay the purchase price as against rights under a mortgage covering after acquired property of the water works, and which embraces its entire working plant including the franchises."

We have heretofore hinted at two lines of decisions in the country, one known as the "Massachusetts Rule" and the other headed by the New York Court. The "Massachusetts Rule," which is the rule of the two Virginias, and of the Fourth Circuit Court of Appeals, is, that the rights of the mortgagee can not be affected by an agreement to which he is not a party, and such rights are superior to the seller of the fixtures retaining title.

Hunt vs. Bay State Iron Co., 97 Mass., 279.

Loraine Steel Co. vs. Norfolk, etc. Street Railway Co., 187 Mass., 500.

In *Hunt vs. Bay State Iron Co.*, 97 Mass., 279, it was held, that:

"An agreement that railroad rails laid in a track should be subject to removal and remain personal property until they were paid for, although valid as to the parties, was not valid as to a prior real estate mortgagee."

The court saying that a mortgagor in possession is not competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold.

In *Watertown Steam Engine Co. vs. Davis*, 5 Houst. (Delaware), 192, it was held that machinery which the

seller thereof knew would become a fixture, became subject to the lien of a prior mortgage on the realty in the absence of fraudulent conduct on the part of the mortgagee, or a valid contract on his part that it should not be bound by the mortgage notwithstanding the retention of the title to the seller; the theory of the court being that where the seller contemplates annexation and installation he takes all the risk of all legal consequences resulting from that act.

In *Richardson vs. Cokeland*, 6 Gray (Mass.), 536; S. C. 66 Am. Dec., 424, it was held that where an engine and boiler had been fixed to the real estate by the owner of a freehold in such manner as to make them part thereof, notwithstanding that at the time of their purchase the purchaser agreed to treat them as personalty and gave a chattel mortgage on them for the purchase price, such mortgage was void as against the subsequent purchaser of the real estate at an assignee's sale, upon the petition of prior mortgagees of the realty though he had notice of the mortgage.

Too the same effect is *Clark vs. Owen*, 15 Gray (Mass.), 522.

Where the property is sold and is regarded as becoming an integral part of the realty, the retention of title thereto or the reservation of a lien thereon is held to be ineffectual to preserve the rights of the seller.

U. S. vs. New Orleans & O. R. Co., *supra*.

Porter vs. Pittsburg Bessemer Steel Co., *supra*.

Phoenix Iron Works vs. New York Security & T. Co., 28 C. C. A., 76.

These bond holders, Bollinger Brothers and George W. Hartman, became the owners for value of the bond

issue of the Brewing Company, of Forty Thousand Dollars, under the mortgage securing them as first mortgagees, which mortgage contained a provision for after acquired property, and which to that extent encouraged them to buy and take up the whole issue; making the bonds more valuable by anticipation than if there had been no such provision in the mortgage. It was anticipated by the purchasers of said bonds that tanks would be installed in the said brewery, and that the same would thereby become a going concern; and they were necessarily, of course, as a business proposition, encouraged to take those bonds.

The mortgage was executed and recorded in the proper office a year or more before the Detroit Steel Cooperage Company furnished the tanks.

It has been argued, and doubtless will be argued again, that the removal of the tanks is a very easy and inexpensive thing to do. But, the evidence in this case shows that the Detroit Steel Cooperage Company sent expert and skilled workmen from their Detroit Factory, who, with the aid of other employees, were engaged for a period of at least two weeks in properly installing the chip tanks in the brewery. In addition to this fact, after said workmen had completed their work, the brick wall of said brewery building had to be built in and bricked up and made part of the brick wall which constitutes the building of the brewery plant.

Under these circumstances the tanks, when so installed, became an integral part of the brewery plant. All agree that without them there would be no brewery, and that to take them out or remove them there would

"(3) The mechanic's lien was subordinate to the lien of the prior mortgage, the mortgagee taking vested priority beyond the power of the mortgager or the legislature thereafter to disturb it."

We cite also the opinion of Mr. Justice Brewer in that case as being the most sound reasoning on the subject which we have been able to find.

At this point we cite the following case without quoting therefrom:

New Orleans R. R. Co. vs. W. P. Mellen, Trustee, and the United States, 12 Wallace Rep., 362-365.

In *Smith vs. Altick*, 24 Ohio St., 369, this language is used:

"Machinery and appliances in a distillery are part of the realty."

In *Wolford vs. Barter*, 33 Minn., 12; 53 Am. Rep., 1, is the following language:

"Casks and hogsheads and fermenting tubs and a copper cooler in a brewery, not fastened to the freehold, are not subject to a mortgage of the land, but tubs, vats, casks, etc., in a brewery, placed there for permanent use and too large to pass out through any ordinary opening, are a part of the mortgaged premises."

In the *Equitable Trust Co. vs. Christ, et al.*, Circuit Court W. D., Mich., Southern District, 47 Fed. Rep.:

"Tubs, vats and casks, which are placed in a brewery with a design of permanent use therein,

and which are too large to pass out through any existing opening, are part of the realty and not fixtures."

In *Ege vs. Kille*, 84 Penna., 333, it was held:

"Whether fast or loose, all the machinery of an ore bank which is necessary to constitute it such, and without which it would not be an ore bank, equipped and ready for use, is a part of the freehold, and passes with the realty."

In *Triplett vs. Mays*, 13 Ky., Law Rep., it is held:

"It is laid down that whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their nature and adaption to the purposes for which they are used."

In *Farrar vs. Stackpole*, 19 Am. Dec., 201, it is held:

"Property in its nature personal, when fitted and prepared to be used with real estate, and necessary for its beneficial use, becomes a part of the realty, and if on the premises at the time of the conveyance, passes by deed of such realty."

"Conveyance of a saw-mill with appurtenances conveys the mill chains, dogs and bars, in their proper places in the mill at the time of the execution of the deed."

The next case we cite is *Frat vs. Whittier*, 58 Cal., 126 S. C.; 41 Am. Rep., 255: (We beg pardon for citing this lengthy excerpt from this case, but justify doing so for the reason that the opinion quoted is a kind of

resume of what we have been endeavoring to present to the Court in our previous remarks.)

"Trover, for one hundred and six soft and chilled rolls, part of the machinery of an iron rolling mill situated in the City of Pittsburgh. The defendant had purchased the property at a sheriff's sale under a writ of *levari facias* issued upon a judgment recovered upon a mortgage executed by Sample, owner of the mill and machinery. The sheriff's conveyance to the defendant described the property sold as a 'lot of ground with one iron rolling mill establishment situated thereon, with the buildings, apparatus, steam engines, boilers, bellows, etc., attached to said establishment.' The rolls in dispute in the present section were not attached to the freehold, but were lying loosely in the mill, to be used as occasion might require. The plaintiff claimed by virtue of a sale to him under a *fieri facias* upon a judgment against the mortgagor, recovered subsequently to the first sale under execution above referred to. Judgment and verdict for plaintiff."

"It is true we ruled in an unreported case, *Chaffee vs. Stewart*, that the spindles and other unattached machinery in a cotton mill, were personal property for purpose of execution, on the authority of certain decisions to that effect, because we were indisposed to be wise above what is written; but an examination of their foundations would probably have led us to a different conclusion. It is unnecessary to pass the learning of the subject in review, as a clear bird's-eye view of it has been spread before the profession by Mr. Justice Cowen in *Walker vs. Sherman*, 20 Wend., 636, from which it

is evident that no distinctive principles pervade the cases universally, and that the simple criterion of physical attachment is so limited in its range, and so productive of contradiction even in regard to fixtures in dwellings to which it was adapted before England had become a manufacturing country, that it will answer for nothing else. My objection to the conclusion drawn from it in that case, is that the court adhered to the old distinction when the question related to a woolen factory, instead of following out the principle started by Mr. Justice Weston in *Farrar vs. Stackpole*, 6 Greenl., 157 (19 Am. Dec., 201), which must, sooner or later, rule every case of the sort. The courts will be drawn to it by its liberality and fitness, while they will be drawn away from the old criterion by its narrowness and want of adaptation to the business and improvements of the age. By the mere force of habit, they have adhered to it in almost all cases after it has ceased to be a guide in any but a few; for nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury to the building. It would be difficult to point out any sort of machinery, however complex in its nature, or by what means soever held in its place, which might not with care and trouble be taken to pieces and removed in the same way, and the greater or less facility with which it could be done, would be too vague a thing to serve for a test. It would allow the stones, hoppers, bolts, meal chests, screens, scales, weights, elevators, hopper-boys, and running gears of a grist mill,

as well as the hammers and bellows of a forge, and parts of many other buildings erected for manufactories, to be put into the class of personal property, when it would be palpably absurd to consider them such. If physical annexation were the criterion in regard to such things, the slightest tack of ligament ought to constitute it, else if we were to get away from even ever so little, we should have no criterion at all. There are so many fashions, methods, and means of it, and so many degrees of connection between material substances, that there is nothing about which men would more readily differ than whether a thing held by a band or cleet were permanently annexed to the freehold, or only for a season; and the proof of this is seen in the result of the decisions professedly regulated by it. To avoid discrepancy, it would be necessary to hold the slightest fastening to be sufficient, but to exclude from the character of real property, as well everything constructively attached to it by the nature of the thing, as everything held to the ground by the attraction of gravitation. Thus cleared of its exceptions, the rule of physical annexation, though at best a narrow one, might furnish a criterion of universal application, though without them, it would make havoc of the cases already decided, and indeed produce the most absurd consequences by stripping houses of their window shutters and doors, and farms of the houses themselves."

"When, therefore, we reflect on the necessary exceptions to the rule, as well as the cases of constructive attachment without the semblance of a tack or ligament, we are not surprised at the confusion and embarrassment in which we are left by the decisions. The inherent imperfections of the rule

required so many exceptions to it, in order to avoid absurdity and injustice, that it has almost ceased to be a rule at all. Being purely artificial, and having no regard to the purposes for which capital is invested, a rigid application of it would be ruinous to the manufacturer. In Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues, and profits shall have been found by an inquest insufficient to satisfy the debt in seven years, not only might this conservative provision be evaded, but a cotton-spinner, for instance, whose capital is invested in loose machinery, might be suddenly broken up in the midst of a thriving business, by suffering a creditor to gut his mill of everything which happened not to be spiked and riveted to the walls, and sell its bowels not only separately, but piecemeal. A creditor might as well be allowed to sell the works of a clock, wheel by wheel. His interest, it may be said, would forbid him so to do; but in the case of a manufactory, he would often be compelled to sell a part, or to sell many times the worth of the debt, and none but a person entering into the business would purchase either a part or the whole. The sacrifice that would be induced by either course, is incalculable. But that is not all. The bare walls of the building would be comparatively of little value. They might, perhaps, answer the purposes of a barn; but so might the walls of a dwelling, when deprived of their doors and windows, and why are these considered a part of the dwelling? Simply because it would be unfit for the purposes of a dwelling without them. What then is demanded in the case of a building erected for a manufactory but an application of the same principle? Whether

fast or loose, therefore, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. This is no more than an enlargement of the principle of constructive attachment; and it is the principle of *Farrar vs. Stackpole*, glanced at by Lord Mansfield in *Lawton vs. Lawton*, 1 H. B., 259, note, who seems to have foreseen its day. I speak not here of questions between tenant and landlord or remainderman, but of those between vendor and vendee, heir and executor, debtor and execution creditor; and between co-tenants of the inheritance. With this limitation, nothing said or done by this court, except its decision in *Chaffee vs. Stewart*, already mentioned, and an *obiter* recognition of an adverse decision by the judge who delivered the opinion of the court in *Gray vs. Holdship*, 17 Serg. & R., 415 (17 Am. Dec., 680), will be found to conflict with the principle proposed. Certainly nothing else ever said by us gives countenance to the notion that the rolls of an iron mill may be seized and sold as personal property."

"But such rolls, being adapted to the manufacture of bars of different shapes and sizes, can not all be used at once; and according to the ordinary criterion proposed, they must be deemed equally a part of it when unfixed to give place to others; for a rolling mill without rollers for all work, would be as incomplete as a hatter's shop without blocks for all heads. By this, however, I mean not to be understood as intimating that any such block is part of the realty. On the principle, then, that a thing temporarily severed from the freehold does not cease to belong to it, the whole set must be

considered a part of the mill. Some two or three of these rolls, however, were duplicate; but all of them had, at one time or another, been in actual operation, and it is impossible to say which were the proper members of the set, and which the super-numeraries. But even if that could be told, all might nevertheless be deemed a part of the mill, seeing that they are often broken and can not be instantly replaced if they are not kept ready on hand. Duplicates necessary and proper for an emergency, consequently follow the realty on the principle by which duplicate keys of a banking house, or the toll dishes of a mill, follow it."

"We are of opinion, therefore, that the rolls in question passed as a part of the freehold by the mortgage and sale on the *levari facias*; but that if they had not passed, they could not have been sold as chattels on the plaintiff's *fieri facias* against the mortgagor; and were it necessary, we would further hold that they might have passed, had they been chattels, by force of the word apparatus in the description of the premises. On all these points the case is with the defendant."

"Judgment affirmed."

PROPOSITION.

HAVING SOLD AND DELIVERED THE CHIP TANKS OR CASKS TO THE SISTERSVILLE BREWING COMPANY TO BE ATTACHED TO THE REAL ESTATE ON WHICH SAID REAL ESTATE THE TRUST MORTGAGE GIVEN TO SECURE THE BONDS WAS A FIRST LIEN, AND HAVING PERMITTED THE SAID TANKS OR CASKS TO ENTER INTO AND BECOME A MATERIAL PART OF THE PLANT OF THE SISTERSVILLE BREWING COMPANY, THE DETROIT STEEL COOPERAGE COMPANY IS NOW ESTOPPED FROM ASSERTING ANY RIGHT OR PRIORITY ON THE PROPERTY OR THE PROCEEDS DERIVED FROM THE SALE THEREOF TO THE INJURY OF THE SECURITY OF THE BONDHOLDERS, BUT MUST BE REGARDED AS HAVING WAIVED ITS RIGHTS, IF ANY, AS AGAINST DEFENDANTS' PRIOR LIEN.

We have already asserted this proposition, that the Detroit Steel Cooperage Company having furnished the chip tanks with notice both actual and constructive of the mortgage on the brewery plant, in existence for more than a year, executed to secure a bond issue of more than forty thousand dollars, which bonds were negotiated and had been sold and were in many innocent hands, the attempt of the said company to secure itself by retention of title was non-effective and abortive, and the moment said chip tanks were placed in said brewery they lost their character of personal property and became a part of the realty without regard

to whether they were very substantially fixed or not. And the attempt to reserve title under the statute is without effect as against the prior mortgage. The mortgage opened up and received within its subject matter everything thereafter placed upon the plant, and that, too, without regard to the question whether the attachment was physically very material or not, provided, always, that the property placed upon the plant was reasonably necessary for the uses and purposes of the plant. The petitioner, the Detroit Steel Cooperage Company, having permitted its property to be taken over by the Sistersville Brewing Company did so with full notice of the prior mortgage, and can not be heard to say that its acts were innocent and that it ought to be shielded and protected from the effect of the prior mortgage, especially in view of the fact that the *bona fide* issue of more than forty thousand dollars worth of bonds were already in the current of trade and business, and had passed *bona fide* out of the hands of the original holders, many of them at least, into the hands of innocent holders.

This is a contest, in fact and in effect, between George W. Hartman and Bollinger Brothers, a corporation, who are innocent bond holders and who are entitled to be paid out of the proceeds of the sale of said Brewery Company, and the petitioner.

We cite *Phoenix Iron Works Co. vs. New York Security & Trust Company*, 83 Fed. Rep., 757. This case was appealed from the Circuit Court of the United States for the District of Kentucky; Taft and Lurton Circuit Judges, and Clark District Judge. We quote from it as follows:

"The learned circuit judge rested his decision in the case upon two grounds: First. That the machinery constituting the steam plant and motive power, without which the railroad company could not be operated, became, when furnished, an essential, integral part of the railway system, and being a part of the original construction work, passed directly under the terms of the general mortgage, and that the stipulation in the contract between Whitley and the petitioner, retaining title, was invalid as against the first mortgage. Second. It was further held that a contract of this character, retaining title as security for a debt, is required to be registered, under the recording acts of the State of Kentucky, and that the contract was for this reason invalid as against creditors, including the bondholders whose debts are by this mortgage secured. Either ground on which the judgment was placed, if legally valid, is conclusive of the case, and renders further discussion of the ruling unnecessary. We may remark that this question is not to be determined by any mere technical theory of what does or does not constitute a fixture, in respect to the ordinary real estate mortgage, as between the mortgagor and mortgagee. Nor does the determination of the case depend on any narrow question of mere physical injury to the building in the removal of the machinery placed therein. Decisions in relation to those questions furnish aid, by analogy, in the solution of a problem like the one at bar, but they are not decisive. The property of the railway company, and the uses of the machinery, are different, and this difference in the nature of the property and the uses to which

it is put must be taken into account. The business is, moreover, *quasi* public, and the franchises of this class are granted in the interest of the public. The principle which controls the case and the reasoning applicable, are fully set forth in *Porter vs. Steel Co.*, 120 U. S., 649, 7 Sup. Co., 1206; *Dunham vs. Railway Co.*, 1 Wall., 254; *Railroad Co. vs. Hamilton*, 134 U. S., 296, 10 Sup. Ct., 546; *Railroad Company vs. Cowdrey*, 11 Wall., 459; *Thompson vs. Railroad Co.*, 132 U. S., 68, 10 Sup. Ct., 29."

See *Evans vs. Kister, et al.*, 92 Fed. Rep., 836.

So counsel for respondents, in view of the text writers and decided cases, conclude that whenever any machinery intended to go into a permanent plant and upon the real estate, is put into such plant, being machinery or appliances without which the plant could not be operated at all, it acquires the same character as the estate on to which it is put, that is, realty, and loses its character as personalty. And the attempt in this case to assert title to it under an attempted reservation of title results in nothing but a futile attempt to destroy the integrity of the plant. This being true, all the appellant's voluminous evidence in this case tending to show the facility with which the chip tanks could be removed goes for naught. The character of the adhesion to the real estate can not play any part; whether fastened with very strong bolts or clamps or simply set in can play no part. The sole question is whether it was intended to be used as a part of the plant and goes to make up the integrity of the plant. If so, it must remain as a fixture and as a part of the real estate, and can not be removed, and this regardless of the question as to the facility with which it might be removed.

In the case of *Lazear vs. Steel Foundry Company*, quoted above, the company furnishing the machinery attempted to reserve title. There was no difficulty in removing the machinery; it was not enclosed. There was simply a roof over it, and the unscrewing of two or three lock bolts would have detached entirely the machinery placed in the plant, and it did seem, if ever there was a case where the right of reservation should have been enforced it was in that case, because the claimants furnishing the machinery gave the foundry company all the value it ever did have, before that it being a mere shed with a boiler and engine; and the machinery put in it by the claimants was used solely and purposely for giving the plant efficiency.

PROPOSITION NO. 2.

THE RIGHTS OF THE MORTGAGEE CAN NOT BE AFFECTED BY ANY AGREEMENT, TO WHICH HE IS NOT A PARTY, MADE BETWEEN THE SELLER AND THE MORTGAGOR IN POSSESSION. THE RIGHTS OF THE MORTGAGEE ARE SUPERIOR TO THOSE OF THE SELLER OF THE FIXTURES ATTEMPTING TO RETAIN TITLE.

In *Tippett & Wood vs. Barham*, 37 L. R. A. (N. S.), 130; S. C. 103 C. C. A., 430; S. C. 180 Fed. Rep., 76, the syllabus is as follows:

"A person undertaking to erect a stand pipe as a part of a water works system, which is to be attached to the foundation by bolts imbedded in it,

can not by contract to which the mortgagee is not a party reserve a right to remove it in case of failure to pay the purchase price as against rights under a mortgage covering after acquired property of the water works, and which embraces its entire working plant including the franchises."

We have heretofore hinted at two lines of decisions in the country, one known as the "Massachusetts Rule" and the other headed by the New York Court. The "Massachusetts Rule," which is the rule of the two Virginias, and of the Fourth Circuit Court of Appeals, is, that the rights of the mortgagee can not be affected by an agreement to which he is not a party, and such rights are superior to the seller of the fixtures retaining title.

Hunt vs. Bay State Iron Co., 97 Mass., 279.

Loraine Steel Co. vs. Norfolk, etc. Street Railway Co., 187 Mass., 500.

In *Hunt vs. Bay State Iron Co.*, 97 Mass., 279, it was held, that:

"An agreement that railroad rails laid in a track should be subject to removal and remain personal property until they were paid for, although valid as to the parties, was not valid as to a prior real estate mortgagee."

The court saying that a mortgagor in possession is not competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold.

In *Watertown Steam Engine Co. vs. Davis*, 5 Houst. (Delaware), 192, it was held that machinery which the

seller thereof knew would become a fixture, became subject to the lien of a prior mortgage on the realty in the absence of fraudulent conduct on the part of the mortgagee, or a valid contract on his part that it should not be bound by the mortgage notwithstanding the retention of the title to the seller; the theory of the court being that where the seller contemplates annexation and installation he takes all the risk of all legal consequences resulting from that act.

In *Richardson vs. Cokland*, 6 Gray (Mass.), 536; S. C. 66 Am. Dec., 424, it was held that where an engine and boiler had been fixed to the real estate by the owner of a freehold in such manner as to make them part thereof, notwithstanding that at the time of their purchase the purchaser agreed to treat them as personalty and gave a chattel mortgage on them for the purchase price, such mortgage was void as against the subsequent purchaser of the real estate at an assignee's sale, upon the petition of prior mortgagees of the realty though he had notice of the mortgage.

Too the same effect is *Clark vs. Owen*, 15 Gray (Mass.), 522.

Where the property is sold and is regarded as becoming an integral part of the realty, the retention of title thereto or the reservation of a lien thereon is held to be ineffectual to preserve the rights of the seller.

U. S. vs. New Orleans & O. R. Co., *supra*.

Porter vs. Pittsburg Bessemer Steel Co., *supra*.

Phoenix Iron Works vs. New York Security & T. Co., 28 C. C. A., 76.

These bond holders, Bollinger Brothers and George W. Hartman, became the owners for value of the bond

issue of the Brewing Company, of Forty Thousand Dollars, under the mortgage securing them as first mortgagees, which mortgage contained a provision for after acquired property, and which to that extent encouraged them to buy and take up the whole issue; making the bonds more valuable by anticipation than if there had been no such provision in the mortgage. It was anticipated by the purchasers of said bonds that tanks would be installed in the said brewery, and that the same would thereby become a going concern; and they were necessarily, of course, as a business proposition, encouraged to take those bonds.

The mortgage was executed and recorded in the proper office a year or more before the Detroit Steel Cooperage Company furnished the tanks.

It has been argued, and doubtless will be argued again, that the removal of the tanks is a very easy and inexpensive thing to do. But, the evidence in this case shows that the Detroit Steel Cooperage Company sent expert and skilled workmen from their Detroit Factory, who, with the aid of other employees, were engaged for a period of at least two weeks in properly installing the chip tanks in the brewery. In addition to this fact, after said workmen had completed their work, the brick wall of said brewery building had to be built in and bricked up and made part of the brick wall which constitutes the building of the brewery plant.

Under these circumstances the tanks, when so installed, became an integral part of the brewery plant. All agree that without them there would be no brewery, and that to take them out or remove them there would

no longer be any brewery plant because beer can not be made without them.

It must be presumed too that the Cooperage Company not only contemplated, but knew that the cooperage was to become an integral part of the plant. It had constructive and actual notice of the aforesaid mortgage, and with this knowledge not only sold the cooperage, but installed it in the only way in which such cooperage is ever installed.

It may be argued, as it has been argued, that these tanks were not bolted down to the real estate nor imbedded in concrete, and that, therefore, they are not a part of the realty; but it is a fact that they were installed in the brewery in the only way in which such tanks are installed, and were held in place by gravity or their own weight, without the necessity of using bolts or other like means; and were installed exactly in the same way in which they would have been installed if they had been paid for.

In these days of modern improvements, the question of the character of the attachment of the fixture, whether strongly bolted and held down, or whether held in place by gravity or their own weight, plays no part in determining whether they are removable or not, where they become, by the act of installing them, an integral part of the plant, and where the seller, especially, installs them and knows that they are to become and to be a part of a going concern.

In *Hunt vs. Bay State Iron Co.*, 97 Mass., 279, the court expressed this view:

“Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by

any arrangement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees as well as all other parties in interest are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver."

To the same effect is the case of *Meagher vs. Hayes*, 152 Mass., 228.

The best considered and best reasoned cases so hold, and the ease or difficulty with which attachments might be removed, we insist, plays no part in determining their character.

The mortgagees in obtaining the bonds contemplated the future acquisition of tanks from some source. The Cooperage Company, when it furnished the tanks, contemplated that they were putting into the plant something that would make it a complete brewery, and an integral part thereof.

We insist, under these circumstances, that the bond holders are not affected and could not be affected by any contract or agreement between the Brewery Company on the one side and the Cooperage Company on the other as to the retention of title of the said cooperage until the same was paid for without the consent of said Bollinger Brothers and Hartman, the bond holders. This we submit is the effect of the best considered cases and opinions on the subject, as well as the best text writers.

In further support of the so-called Massachusetts Rule we desire to quote the following from the case of *Tippett & Wood vs. Barham, supra*:

“Upon the other hand, there are many cases (some of which will be hereinafter referred to) which hold that personal property incorporated into or affixed to real estate in such manner that it would be subject to the lien of an existing mortgage thereon as between the mortgagor and mortgagee will be so subject to the lien of the mortgage, notwithstanding the existence of an agreement between the vendor and the mortgagor that it shall retain its character as personal property, unless the mortgagee be also a party to such agreement. This is what is generally known as the Massachusetts rule, and it has been affirmed by many other courts of last resort, and particularly by the Supreme Court of the United States in several cases hereinafter separately referred to.

We think this latter doctrine announces the correct principle; especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and received in contemplation of such accessions. In such cases the equities of the bene-

ficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgages, are included within it, unless some higher equity or a legal title intervenes.

* * * * *

Under an after acquired property clause such as that contained in the mortgage executed to secure the bondholders in the case at bar, and property acquired by the mortgagor subsequent to the date of execution and delivery of the mortgage, and which is within the general description contained therein, will become as fully subject to the lien of the mortgage in equity as if such property had been owned by the mortgagor at the date of the execution and delivery of the mortgage. *Pennock vs. Coc*, 23 How., 117, 16 L. Ed. 436; *Galveston, H. & H. R. Co. vs. Cowdry*, 11 Wall., 459, 20 L. Ed. 279, 1 Sup. Ct. Rep., 495, 20 L. Ed. 199; *Branch vs. Jesup*, 106 U. S., 478, 27 L. Ed. 279, 1 Sup. Ct. Rep., 495; *Thompson vs. White Water Valley R. Co.*, 132 U. S., 68, 33 L. Ed. 256, 10 Sup. Ct. Rep., 29."

In view of the above statement of law we might look to the exact clause relative to after acquired property contained in the deed of trust from Sistersville Brewing Co. to John S. Sell, trustee, and being the deed of trust by which the bondholders were secured.

"Together with the brewery and all the buildings, machinery and appliances THEREON ERECTED OR TO BE ERECTED with all the appliances thereon belonging or in any wise appertaining and together with the corporate rights and privileges of the said brewing company." (Page 218 of Record.)

It has been argued that there was a great distinction between the case of *Tippet & Wood vs. Barham*, *supra*, and the case at bar on account of the nature and extent of the physical attachment in the former case. However, if the case at bar is to be determined by the extent of the attachment to the freehold we insist that the physical annexation is more manifest in this case than in the former case. In the former case the standpipe was erected upon a foundation of concrete and was attached to the foundation by bolts and taps. All that would have been necessary to disconnect the standpipe from the freehold would have been to remove the taps. It was not imbedded in the concrete and there was no building erected around the same. In the case at bar the tanks were installed in the brewery and the opening through which they were taken into the brewery was walled up with brick and mortar and made a part of the main wall of the brewery. It would have been necessary as the evidence shows, to have torn out this brick wall in order to have removed the tanks.

Again it is said in the case of *Tippett & Wood vs. Barham* that the standpipe was an indispensable part of the water system and without such a standpipe it would have been impossible for the water company to have furnished its consumers with water. The same can be said in the case at bar. The tanks were an indispensable part of the brewery and without such tanks beer could not have been manufactured and the plant would not have performed the function for which it was constructed.

Counsel for respondents now wish to cite the case of *Union Trust Co. et al. vs. Southern Sawmills & Lumber Co. et al.*, 166 Fed., 193, which case is from the State

of North Carolina, and was decided November 5, 1908, by the Circuit Court of Appeals, Fourth Circuit, which is the Circuit from which the case at bar arises.

This case is of importance from the fact of the great similarity of the subject matter, and especially is it cited for the reason that in the opinion the Court interprets the cases of *U. S. vs. Railroad Co.*, 12 Wall., 362; *Fosdick vs. Schall*, 99 U. S., 235; *Myer vs. Car Co.*, 102 U. S., 1, and *York Manufacturing Co. vs. Cassell*, 201 U. S., 344. Counsel for the petitioner have cited these cases, and rely on them strongly; and have placed an interpretation on the opinions rendered in said causes which is clearly contrary to their true meaning and intent, as will be seen from the opinion of the court as quoted below.

The subject matter involved in the suit was the property of the Southern Sawmills & Lumber Company. Upon this property there was a mortgage to the Union Trust Company, trustee, to secure a large bonded indebtedness. In the progress of the litigation the plant was sold, and there remained for distribution among the creditors the sum of \$33,000.00 arising from the sale of the corpus of the plant. The American Woodworking Machinery Company furnished certain machinery to be used in the said Sawmill and entered into a contract of conditional sale with the Sawmill Company whereby it reserved title to itself until the machinery so supplied was paid for. This contract of conditional sale was subsequent to the mortgage of the Union Trust Company, trustee, which mortgage contained an after acquired property clause. The Court in its opinion says:

"In discussing these questions in *Evans vs. Kister*, 92 Fed., 827, at page 836, 35 C. C. A. 28, at

page 37 (Judges Taft and Lurton presiding), it is said :

“ * * * If the machinery so purchased and set up has become so affixed as to be part of the principal thing, it will pass under the mortgage, notwithstanding an agreement between the mortgagor and furnisher that the title should remain in the vendor until payment.

* * * Mere registration of an agreement between the mortgagor and vendor, preserving the personal character of the property affixed to the freehold mortgaged, will not prevent the attached property from passing under a previously existing mortgage. To prevent such a result, the mortgage must be a party to the agreement.’

“See, also, *Railroad Co. vs. Cowdrey*, 11 Wall., 459, 482, 20 L. Ed. 199; *Porter vs. Steel Co.*, 122 U. S., 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210; *In re Tatem* (D. C.), 110 Fed., 519 (a decision of Judge Purnell of North Carolina); *Westinghouse, etc., vs. Kansas City R. R.*, 137 Fed., 40, 41, 71 C. C. A. 1.”

Further in its opinion, the court says :

“Counsel for claimants, however, earnestly insist that as between the parties to the conditional sales agreement, notwithstanding the statute of North Carolina referred to, there is no necessity for recordation of such agreement; that the claims were for unpaid balances due on personal property, the title to which was retained by the vendor, and that the same did not come within the reason of the recordation acts, since they were intended to protect innocent purchasers of property, and not to same harmless buyers who failed to pay for what

they bought; and that such property, as against the vendor, would not be subject to the after-acquired property clause of the mortgage, executed and recorded before the property was sold. They cite in support of their contention four decisions of the Supreme Court, namely, *United States vs. Railroad Co.*, 12 Wall., 362, 20 L. Ed. 434; *Fosdick vs. Schall*, 99 U. S., 235, 25 L. Ed. 339; *Myer vs. Car Co.*, 102 U. S. 1, 26 L. Ed. 59; and *York Manufacturing Co. vs. Cassell*, 201 U. S., 344, 26 Sup. Ct., 481, 50 L. Ed. 782. A careful review of these decisions show that they not only do not support the contention of the claimants, but, on the contrary that the claims cannot be maintained. In the first case, *United States vs. Railroad*, Mr. Justice Bradley, while emphasizing the fact that certain rolling stock of a railroad, consisting of 2 locomotives and 10 cars, acquired by the railroad company on which the purchase price was unpaid, and for which a lien was reserved, held that the after-acquired provisions of a previous mortgage did not apply, notwithstanding the fact that the conditional sales agreement was not recorded; and, speaking for the court, at page 365 of 12 Wall. (20 L. Ed. 434), said:

‘Had the property sold by the government been rails, as in the case of *Galveston Railroad vs. Cowdrey*, or any other material which became affixed to and part of the principal thing, the result would have been different; but being loose property, susceptible of separate ownership and separate liens, such liens, if binding upon the railroad company itself, are unaffected by a previous general mortgage given by the company, and paramount thereto.’

The two following cases (99 U. S., 25 L. Ed. and 102 U. S., 26 L. Ed., *supra*) each involved rolling stock and property of railroads, and expressly recognized the same distinction made by Justice Bradley. The case of *York Manufacturing Co. vs. Cassell*, *supra*, may possibly be susceptible of the interpretation claimed by the vendors here; still, from a careful examination of it, it is quite apparent that it was not the purpose of the court in any way to modify or reverse the doctrine announced in previous cases herein cited, and, moreover, had there been such a suggestion, it would have been *obiter* on the part of the court, the contest there being between a vendor making claim to a balance due on a conditional sales contract which had not been recorded, as against unsecured creditors; and the court expressly emphasized the fact that it was with that class of creditors it was dealing, and that there was no after-acquired clause in the mortgage then under consideration."

There can be no doubt as to the true meaning and interpretation of the cases referred to above and cited by Judge Waddill in his opinion and with these cases we have no quarrel, but simply say that the interpretation given to them by counsel for petitioner is not the true intent and meaning of the said decisions. In this case the Sawmill Company was not a *quasi* public corporation. There would have been no physical difficulty in removing the machinery furnished by the American Woodworking Company, but the court holds that they became an integral part of the plant itself, and thus were subject to the prior mortgage.

We further wish to cite the case of *In re Williamsburg Knitting Mill*, 190 Fed., 871, from the District

Court of the Eastern District of Virginia, and decided June 30, 1911.

This case comes from the State of Virginia, which State is included in the United States Circuit Court for the Fourth Circuit. The subject matter is very similar to that in question in the case at bar; and the opinion counsel believe to be well considered and of much value. It further shows that the Massachusetts Rule has been adopted by the District Court comprised in the Fourth Judicial Circuit, as well as the United States Court for said Fourth Circuit, and is the present existing law in the said Circuit from which this cause arises.

The facts briefly stated are as follows: George H. Holt & Company installed in the mill of the Williamsburg Knitting Mill Company an automatic sprinkler system, supply pipes, etc., and a 50,000 gallon tank and a steel tower for the tank. The tank was bolted to the tower and the sprinkler was installed and ready for service in March, 1910. In the contract made and entered into between the George H. Holt Company and the Knitting Mill Company appears the following:

"It is agreed that the said sprinkler system and equipment shall become, be, and remain the property of the party of the first part until the title thereto is acquired by the party of the second part as hereinbefore provided, and that said system and equipment shall during the period of the agreement herein provided, be, and be considered as personal property, and not a part of the realty."

Previous to the time this contract was entered into the Knitting Mill Company had made and executed a

mortgage to one Henley, trustee, in favor of the Peninsula Bank, to secure a loan of \$12,000. This mortgage contained the following after-acquired property clause:

"Together with the engines, boilers, fixtures, machinery and all other appliances and equipments constituting or in any wise whatsoever connected with the Williamsburg Knitting Mill Company plant, in and upon the premises hereby conveyed, or which may be acquired and placed upon the said premises during the continuance of this trust; it being the true intent and purpose of this deed to convey to the said trustee the entire plant of the Williamsburg Knitting Mill Company for the purposes hereinafter set forth."

The court in delivering its opinion said that there were two questions to be considered, first, whether the after-acquired clause in the mortgage of the 23rd of November, 1909, to Henley, trustee, constituted a lien on the sprinkler system, made a part of the premises after the execution and recordation of the trust deed; and,

Second, whether the referee correctly ruled that it was necessary for the vendors, Holt & Company, to record their contract.

In considering the first proposition, that is, as to the priority of the lien of Henley, trustee, the court says:

"Under the after-acquired clause in the mortgage, as in this case, any property acquired by the mortgagor subsequent to the date of the execution and delivery of the mortgage, which was within the general description of property contained therein,

became as fully subject to the lien of the mortgage, in equity, as if such property had been owned by the mortgagor on the date of the execution and delivery of the mortgage. The authorities to sustain this position are clear, and within comparatively recent date the entire subject has been reviewed by the Circuit Court of Appeals of this circuit in two cases, namely, *Union Trust Co. vs. Southern Sawmills Co.*, 166 Fed., 193, 197, 199, 200, 92 C. C. A., 101, and *Tippett & Wood vs. Barham*, 180 Fed., 76, 80, 103 C. C. A., 430, to which cases, with the authorities cited in each, special reference is made as containing a full review of the authorities governing and controlling this subject.

In order for the after-acquired property clause in the mortgage in question to constitute a valid lien, of course, the property in controversy must come fairly within the terms of such after-acquired property clause; and such after-acquired lien must be subordinate to any pre-existing valid lien upon the property at the time it was placed upon the premises. This case, however, is comparatively free from difficulties in this respect, as it is clear that the sprinkler system in question, when installed, became a fixture and such part of the bankrupt's estate as to form and become a portion thereof, notwithstanding the provision in the contract of sale that it should remain the property of the vendors, and retain its character of personalty; and was hence subject to the after-acquired property clause in a deed heretofore executed, fairly embracing the same."

In this case the court cites the cases of *Union Trust Company vs. Southern Sawmills Company*, *supra*, and

Tippett & Wood vs. Barham, supra, both of which said cases have heretofore been referred to by counsel for respondents. There could have been no great difficulty in removing the sprinkler system from the plant of the Knitting Mill Company. It does not appear from the record that it would have been necessary to tear down and remove brick walls, but on the contrary a part of this sprinkler system could have been removed by simply unscrewing taps. Yet, the court held that this system was within the general description of the property contained in the trust mortgage, and that the lien secured thereby was superior to the lien of the George H. Holt Company.

There is another feature of this case to which we call attention, and that is that the order of December 22, 1909, (on page 200 of the Record) entered in the lower court directing the sale of this property, provided that the receiver should offer and receive bids on the Brewing Company's plant exclusive of the tanks, fittings and fixtures placed therein by the Detroit Steel Cooperage Company; and also offer and receive bids on said tanks, fixtures and fittings separately; and also to offer the said plant as a whole and receive bids thereon; and in any case report these bids to the Court.

The report of sale filed by the Special Receiver January 20, 1910, in the District Court of the United States for the Northern District of West Virginia, reported that the highest bid received for the plant without the tanks was \$4,000.00; that the highest bid received for the said tanks separately was \$500.00; and that for the plant as a whole the highest and best bid received was \$10,000.00, for which latter sum the plant as an entirety was sold; and this report was confirmed by an order

entered in said court on the 20th of January, 1910. This shows, as we submit, that the public considered the cooperage as a valuable integral part of the brewery, and also shows that the brewery without the tanks or cooperage placed therein was a mere shell and practically valueless.

Again, we respectfully submit to the court that the Detroit Steel Cooperage Company has waived its lien on these tanks by its conduct and acts.

In *35 Cyc.*, 673, the rule is stated as follows:

"The condition as to the retention of title by the seller is for his benefit, and may be waived by acts and conduct showing an intent not to rely on such condition, such as laches in exercising his rights, or the election to treat the sale as absolute."

The tanks were sold upon the following conditions—\$2,000, to be paid when the tanks were shipped; \$740, when erected at the brewery and tested; and for the balance of the purchase money, \$2,740, the Brewing Company was to execute a promissory note payable three months after date with six per cent. interest (see page 23 of Record).

On page 90 of the printed record, a witness for the Detroit Steel Cooperage Company, to-wit, Warren L. Fisk, Secretary and Assistant Treasurer of the said Cooperage Company, says:

"We got a note of \$2,740 immediately after the tanks were shipped, and \$1,000 in cash a little later on, I say a month, it might not have been as long as that; I should say it was less than a month when we got a payment of \$1,000 in cash. That is all the money we ever got."

Later, it appears from exhibits filed with Mr. Fisk's evidence, page 93 of the Record, the Sistersville Brewing Company executed to the Cooperage Company two notes dated December 1st, 1908, one for \$2,531.15, and another for \$2,000.00 being the balance due on tanks and accrued interest on the first note given for the tanks. Six days after the date of these notes the conditional sale bill was presented for record in the Clerk's office of the County Court of Tyler County, West Virginia. (See page 24 of Record.) The sale bill was accepted August 8, 1908. The original bill in this cause was filed April 7, 1909, and the decree of sale of the brewery was entered October 30, 1909; and on the 22nd of December, 1909, the Detroit Steel Cooperage Company appeared in this cause and filed its bill.

From this statement of the Secretary and Treasurer of the Detroit Steel Cooperage, it clearly appears that instead of getting \$2,000, when the tanks were shipped, and \$740 in cash when the tanks were erected at the brewery and tested, the Cooperage Company, in fact, only received \$1,000, and accepted a note for only \$2,740, leaving, from the date the tanks were erected, in August or September, 1908, to December 1, 1908, an unsettled balance of \$1,740 for which there seems to have been no money paid or note given. On the 1st day of December, 1908, and over three months after the tanks had been installed, the Cooperage Company closed the account by accepting two notes aggregating \$4,531.15; and seven days later recorded its conditional sale bill in Tyler County.

When these notes became due, so far as the evidence shows, nothing was done by the Detroit Steel Cooperage Company; nor did it take any action until

December 22, 1909, when it appeared and asserted its conditional sale for the first time.

We believe that these facts clearly show that the Detroit Steel Cooperage Company, when it delivered these tanks to the Sistersville Brewing Company and installed them, had no intention whatever of relying on its conditional sale for security for its tanks. It did not collect the \$2,000.00 in cash when the tanks were shipped; nor did it collect the \$740.00 in cash when the tanks were installed; nor did it record its lien.

At the same time, and previous thereto, by actual notice and by way of correspondence, the Cooperage Company had actual notice of the financial affairs of the Brewing Company; and it must be held to have assumed all risks.

As to our proposition that the failure of the petitioner to have the Sistersville Brewing Company pay it the \$2,000.00 in cash when the tanks were shipped, and the \$740.00 when the tanks were erected and tested, and give a note for the residue shows laches on its part, we cite the court to the case of *Chapman & Schoolcraft vs. Lathrop*, 6 Cowen, 110.

In that case the goods were sold to be paid for in cash, no time being agreed on for the payment, as the delivery and payment were to be simultaneous acts. The vendor could have refused to deliver without actual payment, the latter being a condition of the sale. But if he delivered without payment, says the court, the property passes and the condition is removed; and though the vendee afterwards refused to pay, trover will not lie for the goods.

"Upon the sale of goods to be paid for, or security to be given on delivery, and a delivery made without exacting either, and no fraud in the case, complete title passes to the purchaser, and the vendor cannot afterwards reclaim the property upon a refusal to comply with the sale. After such delivery, the law considers the vendor as trusting solely to the personal responsibility of the vendee."

Furniss, et al. vs. Hone, et al., 8 Wend., 248.

In the case of *Lupin, et al. vs. Marie & Varet*, 6 Wend., 77, the court says:

"Where goods are sold for which notes are to be given, and the property is subsequently delivered by the vendor without at the time requiring the notes or annexing any condition to the delivery, such delivery is a waiver of the obligation, which otherwise the vendee must have complied with before he could have demanded the goods, and the vendee becomes the absolute owner."

In the case of *Matthews, et al. vs. Smith*, 31 Atlantic Reporter, 879, the court decides:

"Where property is sold on conditional sale, and the vendor delays for nine months after default in payment has been made, to enforce his rights thereunder, he is precluded from recovering the property as against a *bona fide* purchaser."

In the case of *Peabody, et al. vs. Maguire*, 12 Atlantic Reporter, 631, the court says:

"In a conditional sale, the mere fact of delivery, without performance by the purchaser of the conditions of sale, and without anything being said

about the condition, may afford presumptive evidence of an absolute delivery, and of a waiver of the condition, yet this is a question of fact, to be determined by the evidence and the circumstances of the case."

The following appears in the opinion of the court, rendered in the last above cited case, and reads as follows:

"There is no doubt that it is a well-settled rule of law in this state that a sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee till performance of the condition, and that, in case the condition is not fulfilled, the vendor has a right to repossess himself of the goods, not only as against the vendee, but also as against his creditors, claiming to hold them under attachments. *Everett vs. Hall*, 67 Me., 498; *Brown vs. Haynes*, 52 Me., 580. It is equally well settled that, in the sale of personal property to be paid for by the cash or by note on delivery, the payment of the money or the giving of the note is a condition precedent, and until that is done or waived the title does not pass from the vendor. *Seed vs. Lord*, 66 Me., 580; *Stone vs. Perry*, 60 Me., 50; *Whitney vs. Eaton*, 15 Gray, 225. If the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, a refusal to make such payment would be such a failure on the part of the purchaser to perform his part of the contract as would entitle the seller to put an end to it, and reclaim his goods. In such case the delivery may be regarded as conditional, and, upon

the purchaser's refusal to pay, the seller may at once reclaim the goods. The sale is not consummated, and the title does not vest in the purchaser. No citation of authorities is necessary in support of the principle, equally familiar and well founded, that the vendor may waive the condition of the sale, and by so doing pass the title, although the sale was originally a conditional one. He may waive the payment of the price, or agree to postpone it to a future day, and proceed to complete the delivery. In that case it would be absolute, and the title would vest in the purchaser. A waiver is the voluntary relinquishment of some known right, benefit, or advantage, and which, except for such waiver, the party otherwise would have enjoyed; and therefore, in order for the title to vest in the purchaser when the sale has been conditional, it must in some way appear that the goods were put into his possession with the intention of vesting the title in him, or that there were such acts and conduct on the part of the seller that such intention might be legitimately inferred therefrom. *Farlow vs. Ellis*, 15 Gray, 232; *Paul vs. Reed*, 52 N. H., 138. Even in the case of a conditional sale of goods for cash, there are authorities which hold that a delivery, apparently unrestricted, is a waiver of the condition that payment is to be made before the title passes, although the seller has an undisclosed intent not to waive the condition. *Upton vs. Cotton Mills*, 111 Mass., 446; *Haskins vs. Warren*, 115 Mass., 533; *West vs. Platt*, 127 Mass., 373. But the doctrine which has the support of our own court upon this question, and which seems to be the correct and rational one, is that, even in a conditional sale, the mere fact of delivery, without a

performance by the purchaser of the terms and conditions of sale, and without anything being said about the condition, although it may afford presumptive evidence of an absolute delivery, and of a waiver of the condition, yet it may be controlled and explained, and it is not necessarily an absolute delivery or a waiver of the condition; but whether so or not is a question of fact, to be ascertained from the testimony. *Seed vs. Lord*, 66 Me., 580; *Stone vs. Perry*, 60 Me., 51; *Farlow vs. Ellis*, 15 Gray, 229; *Hammett vs. Linneman*, 48 N. Y., 399; *Smith vs. Lynes*, 5 N. Y., 43. 'This doubtless would be good evidence of its waiver.' *Manufacturing Co. vs. Waterston*, 3 Mete., 18; *Furniss vs. Hone*, 8 Wend., 247; *Carleton vs. Sumner*, 4 Pick., 516; *Smith vs. Dennie*, 6 Pick., 262. Such waiver may be proved, either directly or inferentially, from the circumstances, like any other fact. 'It may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive.' *Farlow vs. Ellis, supra.*"

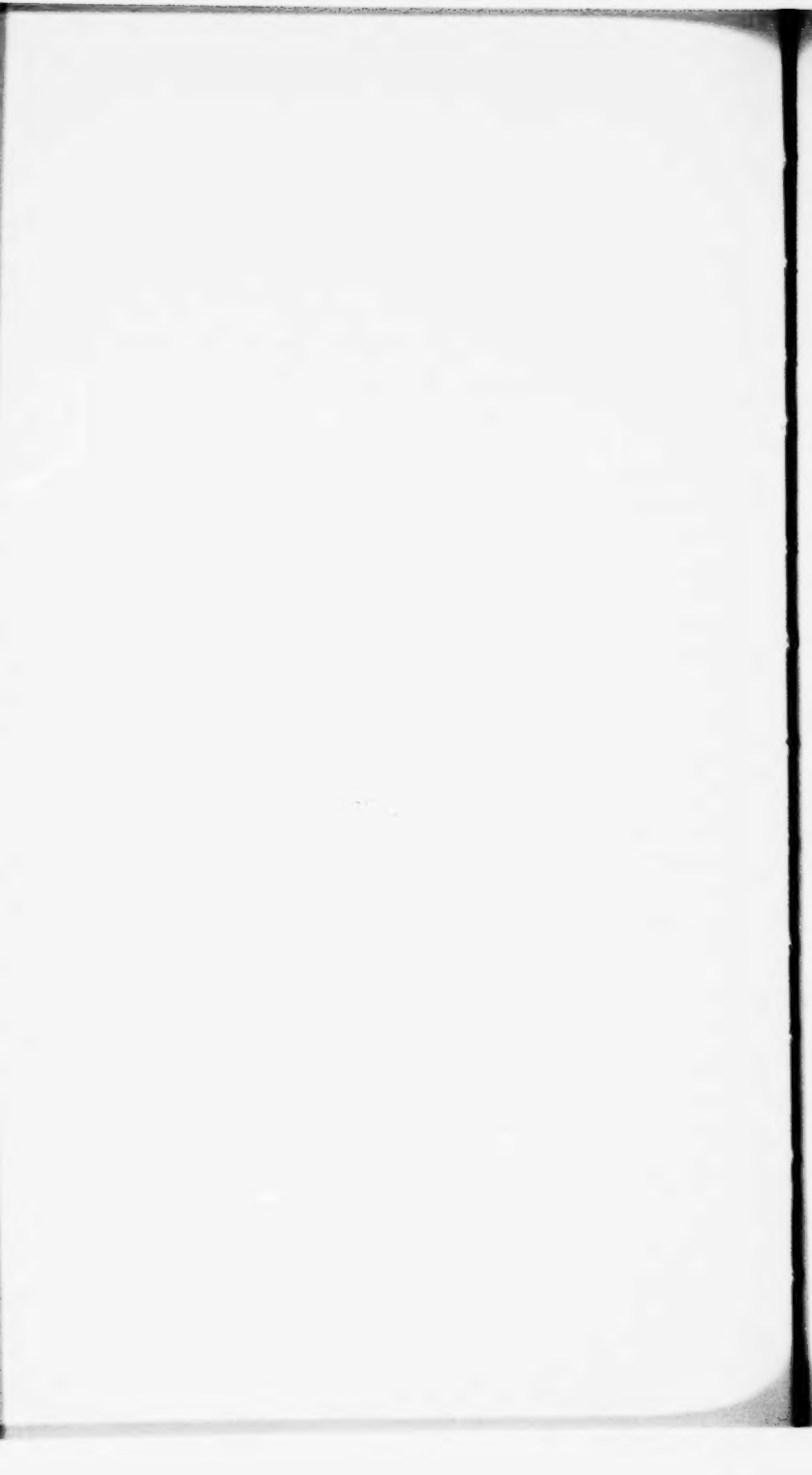
QUESTION OF PARTIES.

Much has been written, and doubtless much will be said, on the question of parties to the foreclosure suit, to wit, the absence of Mr. Sell, the trustee, and other subsequent circumstances. We humbly submit, in this connection, that the action of the District Court in the foreclosure case of *George W. Hartman et al. vs. Sistersville Brewing Company et al.*, can not be collaterally attacked in this suit, but its action must be presumed to be correct. We do not care to go into a discussion in this brief of the question of parties and the diversity of citizenship in the foreclosure case further than as above intimated.

We, therefore, submit, both upon reason and upon authority, and for reasons hereinbefore stated, that the petitioners' bill was properly dismissed with costs, and the said decree of the Circuit Court of the United States for the Northern District of West Virginia should be affirmed.

Respectfully submitted,

ARLEN G. SWIGER,
THOMAS P. JACOBS,
Counsel for Respondents.



6
U. S. DIST. C. S.
FILED
APR 20 1914
JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1913.

No. 368.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,
vs.
SISTERSVILLE BREWING COMPANY, et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.

REPLY BRIEF FOR PETITIONER.

ORLA B. TAYLOR,
CHARLES N. KIMBALL,
WALTER S. SUGDEN,
GEORGE M. HOFFHEIMER,
Counsel for Petitioner.

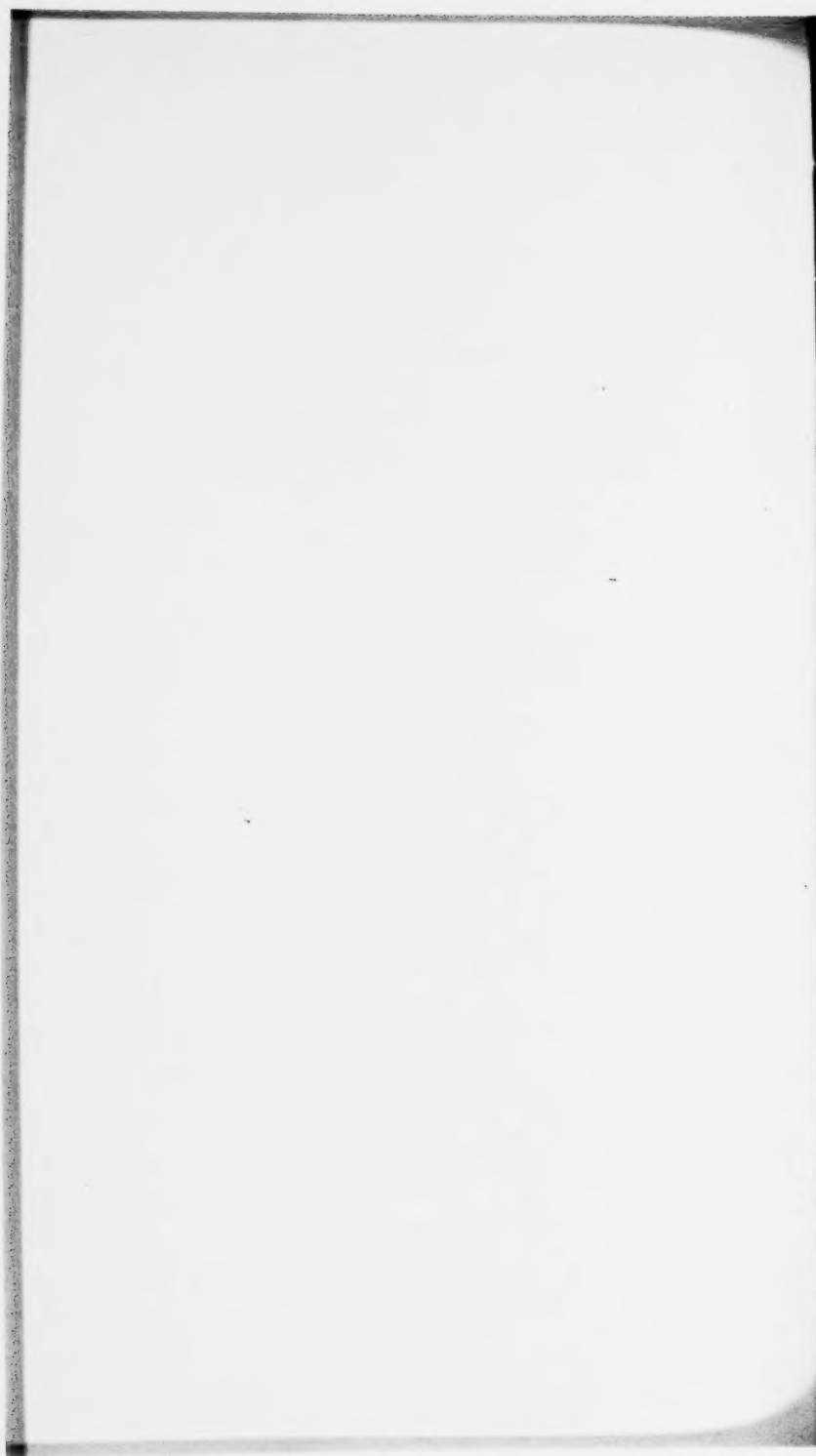


TABLE OF CASES CITED.

A.	PAGES
Abney vs. Ohio Lumber Co., 45 W. Va., 446.....	27
Arrowsmith vs. Gleason, 129 U. S., 86.....	4
Atchison, T. & S. F. R. Co. vs. Morgan, 42 Kan., 23	15
Am. & Eng. Encyc. Law (2 Ed.), 440.....	27
B.	
Baker vs. McClurg, 198 Ill., 28.....	15, 17
Baltimore Building Ass. vs. Alderson, 90 Fed., 142	7
Barney vs. Baltimore, 6 Wall., 280.....	10
Beall vs. Hudson Co. Water Co., 185 Fed., 179....	
Binkley vs. Forkner, 117 Ind., 176.....	15, 16
Birch River Boom & L. Co. vs. Glendon Boom & L. Co., 71 W. Va., 507.....	28
C.	
Campbell vs. Roddy, 44 N. J. Eq., 244.....	26
Campbell vs. Texas, 1 Woods, 368.....	9
Carey vs. H. & T. C. Ry. Co., 150 U. S., 171; 161 U. S., 115	4
Chapman vs. Lathrop, 6 Cow., 110.....	31
Cherry vs. Arthur, 5 Wash., 787.....	30
Coggill vs. Hartford, etc., R. Co., 3 Gray, 545.....	27
Covell vs. Heyman, 111 U. S., 176.....	4
Cox vs. New Bern Light & F. Co., 151 N. C., 648....	25
Cox vs. Wayt, 26 W. Va., 807.....	27
Crippen vs. Morrison, 13 Mich., 23.....	24
Cyc., vol. 35, p. 328.....	32

D.	PAGES
Dillon vs. Barnard, 21 Wall., 430.....	24
Dunham vs. Cincinnati, etc. R. Co., 1 Wall., 254.....	16, 24

E.	
Eaves vs. Estes, 10 Kan., 314.....	15
Edwards & Bradford Lumber Co. vs. Rank, 57 Neb., 323	15, 17
Ege vs. Kille, 84 Pa., 333.....	21
Equitable Trust Co. vs. Christ, 47 Fed., 756.....	22
Evans vs. Kister, 92 Fed., 836.....	25

F.	
Farrar vs. Stackpole, 6 Greenl., 154.....	23
First National Bank vs. Handley, 48 W. Va., 690.....	35
First National Bank vs. Hyer, 46 W. Va., 13.....	20
Flower vs. Elwood, 66 Ill., 438.....	34
F Pratt vs. Whittier, 58 Cal., 126.....	23
Fred W. Wolf Co. vs. Hermann Sav. Bank, 168 Mo. App., 549	15
Furniss vs. Hone, 8 Wend., 248.....	31

G.	
Galveston, etc. R. Co. vs. Cowdrey, 11 Wall., 459.....	24
Gardner vs. Brown, 21 Wall., 36.....	9
Garthan vs. Hickman, 56 W. Va., 75.....	14
Gilbert et al. vs. Peppers et al., 65 W. Va., 355.....	28
Green vs. Phillips, 26 Gratt., 752.....	20, 21
Guggenheimer vs. Lockridge, 39 W. Va., 457.....	27

H.	
Harkness vs. Russell, 118 U. S., 663.....	27
Haven vs. Emery, 33 N. H., 66.....	15

Table of Cases Cited.

3

	PAGES
Hefner vs. Northwestern M. L. Ins. Co., 128 U. S., 754	7
Hendy vs. Dinkerhoff, 57 Cal., 3.....	15
Hollenberg Music Co. vs. Bankston (Ark.), 154 S. W., 1139	34
Holley Mfg. Co. vs. New Chester Water Co., 53 Fed., 492	25
Holt vs. Henly, decided March 16, 1914.....	24, 25
Hopwell Mills vs. Taunton Savings Bank, 150 Mass., 519	15
Hunt vs. Bay State Iron Co., 97 Mass., 279.....	15
Hurzthal vs. Hurxthal, 45 W. Va., 584.....	10, 11, 13, 20

J.

Johnson vs. Christian, 125 U. S., 642.....	4
J. L. Mott Iron Works vs. Middle States etc. Co., 17 App. D. C., 584.....	25
Jones, Mortgages, Vol. 2 (2 Ed.), Sec. 924.....	34

K.

Kendig vs. Dean, 97 U. S., 423.....	10
Kimball, The, 3 Wall., 37.....	35
Kuisely vs. Williams, 3 Gratt., 253.....	34
Krippendorf vs. Hyde, 110 U. S., 276.....	4

L.

Lazear vs. Ohio Valley Steel Co., 65 W. Va., 105	20, 26, 28
Leonard vs. Davis, 1 Black, 476.....	476
Lerain Steel Co. vs. Norfolk & B. St. R. Co., 187 Mass., 50	15
Lupin vs. Marie, 6 Wend., 707.....	31

M.	PAGES
Maher vs. Tower Hotel Co., 94 Fed., 225.....	9
Matthews vs. Smith (Del.), 31 Atl., 879.....	33
Mercantile Trust Co. vs. Portland & O. R. Co., 10 Fed., 604	9
Merchants Nat. Bank vs. Good, 21 W. Va., 455....	35
Minnesota vs. Northern Securities Co., 184 U. S., 199	10
Monarch Laundry Co. vs. Westbrook, 109 Va., 382	21
Moore vs. Tearney, 62 W. Va., 72.....	28
Morgan vs. Snodgrass, 49 W. Va., 387.....	27
Morgan's L. & T. R. & S. Co. vs. Texas Cent. R. Co., 137 U. S., 171.....	4
Myers vs. Swann, 107 U. S., 584.....	9

Mc.

McComb vs. Donald, 82 Va., 903.....	27
McFadden vs. Crawford, 36 W. Va., 671.....	19, 20

N.

Norris vs. Lake, 89 Va., 524.....	34
Northwestern Mut. L. Ins. Co. vs. George, 77 Minn., 319	22

O.

Omaha vs. Brown, 21 Wall., 36.....	9
------------------------------------	---

P.

Pacific Ry. Co. vs. Missouri Pacific Ry. Co., 111 U. S., 505	4
Page vs. Edwards, 64 Vt., 124.....	34
Patton vs. Moore, 16 W. Va., 428.....	19, 20

Table of Cases Cited.

5

	PAGES
Peabody vs. Maguire, 79 Me., 572.....	31
Phoenix Iron Works Co. vs. N. Y. S. & T. Co., 83 Fed., 757	25
Porter vs. Steel Co., 122 U. S., 267.....	24
Put-in-Bay Water Works &c. Co. vs. Ryan, 181 U. S., 409	4

R.

Richardson vs. Lorce, 94 Fed., 375.....	4
Roby vs. Smith, 131 Ind., 342.....	9

S.

Segrist vs. Crabtree, 131 U. S., 287.....	35
Shelton vs. Ficklin, 32 Gratt., 735.....	20, 21
Shields vs. Barrow, 17 How., 130.....	10
Shirk vs. La Fayette, 52 Fed., 857.....	9
Smith vs. Altick, 24 Ohio St., 369.....	22
Southbridge Savings Bank vs. Exeter Machine Co., 127 Mass., 542.....	15
Stinson vs. Bishop, 82 Va., 190.....	34
Sunflower State Refining Co., Re, 195 Fed., 180....	25, 26

T.

Teaff vs. Hewitt, 1 Ohio St., 511.....	14, 17, 21, 22, 23
Thompson vs. White Water, etc. R. Co., 132 U. S., 68	16, 24
Thayer vs. Life Association, 112 U. S., 717.....	9
The Kimball, 3 Wall., 37.....	35
Tift vs. Horton, 53 N. Y., 377.....	15, 18, 24
Tippett vs. Barham, 180 Fed., 76.....	25
Toledo, D. & B. R. Co. vs. Hamilton, 134 U. S., 296	24
Triplett vs. Mays, 13 Ky. Law Rep., 874.....	23

U.	PAGES
U. S. vs. New Orleans R. R., 12 Wall., 362.....	26
Union Trust Co. vs. Southern Saw Mills Co., 166 Fed., 193	25
V.	
Van Ness vs. Pacard, 2 Pet., 413.....	16
Voorhis vs. Freeman, 2 Watts & S., 116.....	21
W.	
Walker vs. Sherman, 20 Wend., 636.....	
Webster Lumber Co. vs. Keystone Lumber Co., 51 W. Va., 545	14
Weinberg vs. Rempe, 15 W. Va., 829.....	27
White vs. Ewing, 159 U. S., 53.....	4
Wicks vs. Island Park Ass'n, 229 Pa., 400.....	15, 22
Wiggins Ferry Co. vs. Ohio & Miss. R. Co., 142 U. S., 396	16
Williamsburg Knitting Mill, Re, 190 Fed., 871.....	25
Winslow vs. Merchants Ins. Co., 4 Mete., 306.....	18
Wolford vs. Baxter, 33 Minn., 12.....	22

INDEX.

PAGES

Authorities on Fixtures Relied on by Respondents	14, 19, 20, 21, 22, 23
a. Cases Concerning Parties Occupying Different Relations	14
b. Cases Adhering to the Massachusetts Rule	24
c. Cases in this Court, in which the Chattel has been Incorporated with the Realty.....	24
d. Cases in which Circuit Court of Appeals have Misapprehended and Misapplied the Cases in this Court.....	25
Bill of Petitioner Filed, Dec. 22, 1909.....	4, 5

CIRCUIT COURT—

Hartman et al. vs. Brewing Co.—Proceedings in	3, 4, 5, 6, 7, 8, 11, 12, 13
---	------------------------------

CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT—

Cases Misapplied by	25
Conflict with Circuit Courts of Appeals.....	25
Conflict with U. S. Supreme Court—Holt vs. Henly, Decided March 16, 1914.....	24, 25

CONDITIONAL SALE—

Recording—

Statute Regarding Substantially Same as that Relating to Deeds, Deeds of Trust and Mortgages	27
Unnecessary as Against Prior Mortgage..	26

FEDERAL COURTS—	PAGES
Circuit Courts of Appeals—Cases in Supreme Court of U. S., Misapprehended and Misapplied by.....	25
Holt vs. Henly, Decided March 16, 1914.....	24
Supreme Court of U. S.—Cases in Which Chattel has been Incorporated with the Realty	24
FIXTURES—	
Authorities on—Relied on by Respondents	14, 19, 20, 21, 22, 23
Intention of Party Making Annexation—Effect of	14, 15, 17, 23
Relation of Parties Making Annexation—Effect of	14, 16, 17, 18, 23
Hartman et al. vs. Sistersville Brewing Co. et al.	
Bill Filed in, April 9, 1909.....	3
Decree of Sale in, Entered Oct. 30, 1909.....	3
Order Modifying Order of Sale Entered Dec. 22, 1909	5
Proceedings in	3, 4, 5
Receiver Appointed in, April 17, 1909.....	3
Resignation of John S. Sell, Trustee Dated Dec. 20, 1909	8
Sale, Decree of, Entered in Oct. 30, 1909.....	3
Sale Made in, Dec. 27, 1909.....	5
Sale in, Bids Made at.....	5, 13
Sale in, Bids Made by Bondholders.....	5, 13
Sale in, Confirmed Jan. 20, 1910.....	5
Sale in, as Establishing Extent and Materiality of Injury	10
Sale in, Collusive, Fraudulent and Without Jurisdiction	3, 4, 6, 11

	PAGES
Trustee in Mortgage Indispensable Party....	9
Trustee Refusal to Act Does Not Excuse Non-Joinder	9
Trustee Non-Joinder of Ousted Jurisdiction	9, 10
Trustee Accepted Trust	8
Hurxthal vs. Hurxthal, Rule in as to Damages....	10, 11
Intention of Parties Making Annexation—Effect of	14, 15, 17, 23
Injunction, Motion for by Petitioner, Dec. 22, 1909	5
Injunction, Motion for not Passed on.....	5
Injury—Sale in Hartman Case as Establishing Extent of Injury	10
Rule in Hurxthal vs. Hurxthal.....	10, 11
Jurisdictional Question in Hartman Case 2, 6, 7, 8, 9, 10 Non-Joinder of Trustee in Mortgage.....	3, 6
Non-Joinder of Petitioner.....	3, 5
Massachusetts Rule	24
Recording Statute of West Va.....	26, 27, 28
Contract Reserving Title, Though Unre- corded, Valid as Against Prior Mortgage	26
Creditors within Protection of Statute are Lien Creditors	28
Person Secured by Deed of Trust or Mort- gage is a Purchaser and Not a Creditor in Meaning of	27
Prior Mortgagee Not Entitled to Protection of	26
Substantially Same as That Relating to Re- cording of Deeds, Deeds of Trust and Mortgages	27
Relations of Parties Making Annexation—Effect of	14, 16, 17, 18, 23

	PAGES
Reservation of Title (See "Conditional Sale")	
Sale in Hartman Case.....	5
As Establishing Extent and Materiality of	
Injury	10, 11, 12, 13
Bids Made at	5, 13
Waiver of Title by Petitioner set up.....	29, 35
Because of Failure of Petitioner to Require	
Payment in Strict Accord with Contract....	29
Contract, Terms of, Complete Answer to Ob-	
jection	29
Contract, Contemplated Parties Might do	
what was Done.....	30
Debt is Principle Thing and Security Still	
Stands for Indebtedness Whatever	
Changed Form It Assumes.....	34
Note Taking of Not Absolute Payment.....	35

IN THE
Supreme Court of the United States

OCTOBER TERM, 1913.

No. 368.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,
vs.
SISTERSVILLE BREWING COMPANY, et al., Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.

REPLY BRIEF FOR PETITIONER.

Statement.

The Brief for Petitioner, heretofore filed, anticipated most of the matters argued in the briefs filed on the part of the respondents. The latter briefs, however, contain a few points to which we desire to refer.

Argument.

I.

THE JURISDICTION IN THE HARTMAN CASE.

In one of the briefs for the respondents it is said :

“On page 10 of the brief, counsel for petitioner seems to have conceded that in the case of *George W. Hartman, et al. vs. Sistersville Brewing Company, et al.*, the District Court did have jurisdiction and authority. They seem, therefore, to have waived any further insistence upon that point.”

The foregoing comment is inaccurate. Both the Circuit Court and the Circuit Court of Appeals ignored all questions of jurisdiction and procedure in the *Hartman Case*, and based their decisions on their views of the relative rights of the petitioner and the bondholders, by virtue of the reservation of title and right of possession in the contract between the petitioner and the Brewing Co., on the one hand, and the after-acquired property clause in the mortgage of the Brewing Co. to John S. Sell, Trustee, on the other hand. As, therefore, those decisions proceeded on the substantive ground of lack of title in the petitioner, as against the bondholders, regardless of the absence of jurisdiction in the *Hartman Case*, the question of jurisdiction seemed to be quite beside the mark. Nor would that question be now pertinent, had not the respondents, in aid of their argument that the brewery would be materially injured by the removal of the tanks, vouched the sale under the

Hartman decree and the relative prices realized thereat. That sale and those prices, we submit, have no probative force against the petitioner.

In the *Hartman Case*, on April 9, 1909, the bill was filed by Hartman and Bollinger Bros., residents and citizens of Pennsylvania, as bondholders under the mortgage to Sell, Trustee, against the Brewing Co. and certain petty lien creditors of the Brewing Co., all residents and citizens of West Virginia, praying the foreclosure of that mortgage, the appointment of a receiver of the property of the Brewing Co., an injunction against said petty lien creditors, and general relief. (Rec., p. 175.) Jurisdiction was invoked on the ground of diversity of citizenship, and Sell, Trustee, a resident and citizen of Pennsylvania, was not joined as a party, it being averred untruthfully, fraudulently and collusively (Rec., pp. 188, 217) that he had never accepted the trust and refused to act. Neither was the present petitioner, a resident and citizen of Michigan, joined as a party, nor was the existence of its claim mentioned.

On April 17, 1909, a receiver was appointed, who took into his custody all the property of the Brewing Co., together with the tanks. (Rec., p. 191.)

On October 30, 1909, a decree was entered, directing the receiver to make sale of all the property, including the tanks. (Rec., pp. 194, 195.) This decree purported to be rendered not only upon the bill taken for confessed, but also "by consent of all the parties interested in the result thereof, as is indicated by the signatures of counsel at the foot of this decree." And at the foot of the decree, in token of consent, were affixed the signatures of Messrs. Thomas P. Jacobs and Arlen G. Swiger, not

only as counsel for the then plaintiffs and all bondholders, but also as "counsel for all the unsecured creditors." (Rec., pp. 194, 195.) It is established that this petitioner never gave, authorized or ratified such consent, nor authorized or ratified the appearance of said counsel. (Rec., pp. 13, 65, 66, 87.) We impute to said counsel no professional or personal impropriety; for we know that they are incapable of it. Obviously they were imposed on by their clients, the then plaintiffs. But the facts themselves compel the characterization of the consent, and the decree thereby obtained, as fraudulent and collusive.

Following this decree, and while the receiver was advertising the sale of the property decreed to be sold, including the petitioner's tanks in his possession, the petitioner filed its ancillary bill in said Circuit Court against the parties to the *Hartman Case*, and Sell, as trustee, the receiver (leave to sue him having been obtained in the *Hartman Case*), and other parties. By this bill the petitioner asserted title to the tanks in the receiver's possession (*Krippendorf vs. Hyde*, 110 U. S., 276, 283; *Correll vs. Heyman*, 111 U. S., 176, 181; *Morgan's L. & T. R. & S. Co. vs. Texas Central R. Co.*, 137 U. S., 171, 201; *White vs. Ewing*, 159 U. S., 53; *Put-In-Bay Water Works &c. Co. vs. Ryan*, 181 U. S., 409, 433); attacked the *Hartman case*, to which the petitioner was no party, and the proceedings and decree therein, as fraudulent, collusive and lacking jurisdiction, (*Pacific Ry. Co. vs. Missouri Pacific Ry. Co.*, 111 U. S., 505; *Johnson vs. Christian*, 125 U. S., 642; *Arrowsmith vs. Gleason*, 129 U. S., 86; *Carey vs. H. & T. C. Ry. Co.*, 150 U. S., 171; 161 U. S., 115; *Richardson vs. Loree*, 94 Fed., 375) and prayed an injunction against the sale of the tanks under said decree, and a recovery of said tanks

or the balance of the purchase money due thereon. (Rec., p. 2.)

On December 22, 1909, pursuant to notice, a motion for an injunction, pursuant to the prayer of said bill, was made and argued (Rec., pp. 33, 34), but the same was never acted on by the court. On the same day, however, the court, of its own motion, entered an order in the *Hartman Case*, modifying the decree of October 30, 1909, so that the receiver was directed to offer, and receive bids for, the plant of the Brewing Co., exclusive of the tanks, the tanks separately, and the plant as a whole; and to report said bids to the court. (Rec., p. 200.)

The court having not passed on said motion for an injunction, the receiver on December 27, 1909, sold said property. The report of sale (Rec., pp. 201, 203) show that one Iams bid \$4,000 for the brewery, without the tanks, and \$500 for the tanks separately, and that S. W. Bollinger (president of Bollinger Bros.), Hartman, Iams and one Oyer bid \$10,000 for the brewery, with the tanks. And said report states "that the gentlemen who made the bid of ten thousand (\$10,000.00) dollars for the entire plant are the owners of a large majority of the first mortgage bonds of said plant." (Rec., p. 203.) As to ownership of the bonds, see also Rec., pp. 176, 177.

This sale was confirmed on January 20, 1910, the decree directing the proceeds of sale to remain undischarged until the decision of this suit, and this petitioner should have the same rights against said fund as it would have had against the specific property. (Rec., pp. 207, 208.)

For present purposes, it would, perhaps, be sufficient to advert to the non-joinder of the petitioner as a

party to the *Hartman Case*. But it is worth while to refer further to the proceedings, the sale in which is supposed by the respondents to constitute evidence of the materiality and extent of the injury to the brewery, consequent on the removal of the tanks.

The fraud, collusion, and lack of jurisdiction in the *Hartman Case* arise in a double aspect, the first touching the right to dispose of the petitioner's property, and the second referring to the power of the Circuit Court as a federal court.

We are not ignorant of the general rule of the federal courts, that in a foreclosure suit neither prior nor junior incumbrancers are necessary parties. But the case falls without that rule. The *Hartman* bill not only prayed the foreclosure of the mortgage, but the appointment of a receiver, and the ascertainment and enforcement of the liens against the property of the *Brewing Co.*

In the *Hartman* bill no mention was made of the title to the tanks, though the reservation of title was of record, and was known to *Bollinger Bros.*, if not to *Hartman*. It was followed by proceedings evincing a purpose not merely to enforce the lien of the deed of trust and bar the equity of redemption of the parties to that bill, but to deny and annul the title of the petitioner. First came the appointment of a receiver, who took the tanks into his possession. Then a decree of sale was procured. This decree purported to be rendered not only upon the bill taken for confessed, but "by consent of all the parties interested in the result thereof, as is indicated by the signatures of counsel at the foot of this decree." And at the foot of the decree, in token of

consent, were affixed the signatures of Arlen G. Swiger and Thomas P. Jacobs, not only as counsel for the then plaintiffs and all bondholders, but as "counsel for all the unsecured creditors." And by this decree, the receiver was directed to sell not alone the right, title or interest of the Brewing Co. in the tanks, but the tanks themselves. Under this decree, the subsequent sale of the tanks was made, pending this present suit.

Of the foregoing proceedings in any view of them, the petitioner had a right to complain. If the reservation of title was ineffective, and the petitioner was merely an unsecured creditor, the pretended consent to the decree as "for all the unsecured creditors" was false and fraudulent; for it is established that the petitioner never gave or authorized such consent.

If, on the other hand, the reservation of title was valid, then it is equally plain, not only that the recital of the decree that it was consented to by "all the parties interested in the result there," was false and fraudulent, but that the court was without jurisdiction to affect by its decree the title to the tanks in a suit to which the petitioner was not a party, and in which the mention of the petitioner's title was studiously excluded from the record. See:

Baltimore Building Association vs. Alderson,
90 Fed., 142;

Hefner vs. Northwestern M. L. Ins. Co., 128
U. S., 754.

Jurisdiction of the *Hartman Case* was attempted to be founded upon diversity of citizenship. The plaintiffs in that case were residents and citizens of Pennsylvania, and the trustee of their mortgage was likewise

a resident and citizen of Pennsylvania, who was alleged never to have accepted the trust and to have refused to proceed to execute the same. But the record renders it apparent that the allegations as to the non-acceptance of the trust were not only false, but known to be false. Their answer in the present case shows that the mortgage was delivered to and accepted by Sell, as trustee; and no other delivery is shown to have been made. The bonds were authenticated by Sell, as trustee. And the evidence of S. W. Bollinger (Rec., p. 118) is express, that the very bonds acquired by the plaintiffs in the Hartman bill were delivered to Bollinger Bros. by Sell, as trustee.

More than this, the very resignation of Sell from the office of trustee, filed in the *Hartman Case* (Rec., p. 200), shows that he accepted the trust and acted as trustee until December 20, 1910, after the decree of sale and only two days before the commencement of this present suit, which suit, by reason of a notice of motion, was known to be in contemplation, as early as December 11, 1909. (Rec., p. 202.) The letter of resignation, indeed, indicates that the purpose to foreclose the deed of trust was first brought to his knowledge after the filing of the Hartman bill, and that the resignation was obtained as an afterthought, in order to bolster up that bill.

In his letter of resignation, Sell assigns as the ground therefor, that he has been advised that he is disqualified to act, by reason of his non-residence in West Virginia. We do not venture to conjecture the source of this sapient advice, so consistent with the necessities of the plaintiffs in the *Hartman Case*, but merely observe that, in the absence of statutory disqualification, an alien or non-resident may be a trustee

(*Perry, Trusts*,—6 Ed.—sec. 55); that there is no statutory disqualification in West Virginia; and that a statute attempting to confine trusteeship to residents, has been held violative of the constitution of the United States.

Roby vs. Smith, 131 Ind., 342;

Shirk vs. La Fayette, 52 Fed., 857.

If any one proposition is well settled, it is that a trustee is an indispensable party to a suit to foreclose a mortgage, or otherwise affecting the trust property.

Gardner vs. Brown, 21 Wall., 36;

Maher vs. Tower Hotel Co., 94 Fed., 225;

Mercantile Trust Co. vs. Portland & O. R. Co.,
10 Fed., 604;

Thayer vs. Life Association, 112 U. S., 717.

Refusal to act, does not excuse non-joinder; for in such case the refusal must be alleged, and the trustee joined as a defendant.

Gardner vs. Brown, 21 Wall., 36;

Omaha Hotel Co. vs. Wade, 97 U. S., 13;

Campbell vs. Teras, 1 Woods, 368;

Myers vs. Swann, 107 U. S., 584.

In *Gardner vs. Brown*, the trustee had never qualified, by giving bond under the state law; but he was held an indispensable party.

If then the trustee was an indispensable party to the Hartman bill, his residence and citizenship, being the same as that of the plaintiffs, would, had he been joined as a defendant, have ousted jurisdiction.

Gardner vs. Brown, 21 Wall., 36;

Myers vs. Swann, 107 U. S., 584;

Thayer vs. Life Association, 112 U. S., 717.

And certainly it cannot be true that a jurisdiction which in fact does not exist, can, as against the owner of a property involved, who is not joined as a party, create a jurisdiction by false and fraudulent excuses for the non-joinder of the trustee.

It was argued below that the joinder of a trustee, who is a non-resident, may be dispensed with, under the Act of Congress of February 28, 1839, and the old forty-seventh equity rule; but neither the statute nor the rule has any such scope. It is perfectly well settled that under the statute or rule, the joinder of an indispensable party is not excused, even if the requirement of joinder would oust the jurisdiction of the court.

Minnesota vs. Northern Securities Co., 184 U. S., 199;

Shields vs. Barrow, 17 How., 130;

Barney vs. Baltimore, 6 Wall., 280;

Kendig vs. Dean, 97 U. S., 423.

II.

THE SALE IN THE HARTMAN CASE, AS ESTABLISHING THE EXTENT AND MATERIALITY OF INJURY.

The sums bid at the sale in the *Hartman Case*, are referred to by the respondents, as evidencing the essentiality of the tanks to the integrity of the brewery; and *Hurxthal vs. Hurxthal*, 45 W. Va., 584, is cited to the effect that the damage to the realty is to be measured by the difference between the bid for the brewery with the tanks, and the bid for the brewery without the tanks,

and that the petitioner would, in any event, be entitled to only the amount of the separate bid for the tanks.

The rule laid down in the *Hurxthal Case* as to the measure of damages, is perfectly correct; but it has no application to the present controversy. In that case, the court had unquestioned jurisdiction, the chattel mortgagee was a party and bound by the decree, and the proceedings were pursued justly and in good faith. Sale was made of an unclouded title to the property covered by the chattel mortgage. A third party bidding for the property, was assured that he would have and be able to hold the property for which he bid. The chattel mortgagee bidding, was certain that, to the extent of his claim, the amount of his bid would go to the satisfaction of his unquestioned mortgage lien, and that unsecured creditors would not share therein. There was every incentive to bid the full and fair value of the property.

In the *Hartman Case*, the petitioner was not a party, and the proceedings were, as to the petitioner, fraudulent, collusive and without jurisdiction. The petitioner was not bound by the decree of sale, and if not bound by the decree, *a fortiori* it was not bound by the sale held under color of that decree.

Was the sale a fair one, affording a just measure of values and damages? The names of the bidders and the amounts of their bids answer negatively. The bidders were all bondholders under the mortgage to Sell, trustee. (Rec., pp. 176, 177, 203.) The petitioner's bill was filed, and a motion for an injunction against this sale was under consideration by the court. Hartman and Bollinger Bros., of which S. W. Bollinger was

president, were parties to the petitioner's bill and had appeared in opposition to the motion for an injunction. The record in the *Hartman Case*, by the petitioner's petition for leave to sue the receiver and the order granting leave, gave notice to Iams and Oyer of the pendency and object of the petitioner's bill, besides which they were affected with the notice had by their associates, Hartman and Bollinger. It is at once clear that the bondholders were interested in defeating the petitioner's claim, if possible, and if defeat were not possible, then to frame their bids to the prejudice of the petitioner, by minimizing the value of the tanks as separate property, and exaggerating the damage done by their removal. It is also patent that, even if actuated by the best of motives, these purchasers bid with full warning that, if the petitioner succeeded in its suit, they would lose the tanks; that their purchase was a sheer gamble on the event of this suit; and that, therefore, only a low bid was prudent.

Turn now to the situation of a third person. For the brewery, without the tanks, he could not compete with the bondholders; for they could turn in their bonds for the purchase price, without advancing a dollar, while the third person would be compelled to pay cash. For the tanks, either alone, or together with the brewery, he would not, in a lucid interval, bid; for the petitioner was not bound by the decree, and was then asserting title, and, if the petitioner succeeded, the purchaser would lose the tanks. It follows that all competition from a third person was precluded.

We come next to the petitioner. It could not, without recognizing the validity of the decree, which it was at the very moment attacking, bid for the tanks; and as

to the brewery or the tanks, with the brewery, it was under the same disadvantage as a third person. Unlike the chattel mortgagee in the *Hurxthal Case*, had the petitioner bid for the tanks, while its title thereto was contested or ignored by the bondholders, it would have incurred the risk that, if its title was defeated, it would stand only as an unsecured creditor, and be compelled to share the proceeds of the tanks with the bondholders, who, to the extent of any deficiency in the proceeds of the realty, would likewise stand as unsecured creditors and be entitled to share therein, even if the mortgage did not cover the tanks. Here again competition was precluded.

That the purchasers bid whatever prices they chose, unhindered by competition or fear of it, is plainly reflected by the concrete figures. Here was a brewery, which cost \$177,000 (Rec., p. 94), evidently including the land. Bollinger Bros. were paid for the construction and equipment, without the tanks, the ice machine and other things, \$85,000 in stock and bonds. (Rec., pp. 58, 94, 102, 103, 112, 115, 122.) The price of the tanks was \$5,480 (Rec., pp. 95-98), and they were still in good condition (Rec., pp. 157, 159), six of the thirteen tanks never having been used. (Rec. p. 159.) The expense of removing and restoring the wall within the arch, in order to take out the tanks, would not exceed \$50. (Rec., pp. 81, 83, 131, 132, 152, 153.) Yet these bondholders bid \$4,000 for the brewery, without the tanks, \$500 for the tanks alone, and \$10,000 for the brewery with the tanks. And the respondents seriously argue that these bids are the measure of value and damages, conclusive upon the court and the petitioner. We think that no further comment is necessary.

III.

THE AUTHORITIES ON FIXTURES RELIED ON
BY RESPONDENTS.

The brief filed by the respondents engages in an elaborate citation of cases not in point. The cases cited may be grouped in four irrelevant classes: (a) Cases concerning parties occupying relations fundamentally differing from those existing in the case at bar; (b) cases adhering to the Massachusetts rule, which never has been adopted in West Virginia; (c) cases in this court, in which the chattel has been so incorporated with the realty as to have lost its character and identity as a chattel; and (d) cases in certain circuit courts of appeals, which have misapprehended and erroneously applied the above mentioned cases in this court.

It is proposed to refer to these four classes of cases in the order above stated.

(a)

CASES CONCERNING PARTIES OCCUPYING DIFFERENT
RELATIONS.

The authorities dealing with the law of fixtures, one and all, lay stress on the intention of the party making the annexation of the chattel to the realty, as a determining factor in the ascertainment of its status.

Webster Lumber Co. vs. Keystone Lumber Co.,

51 W. Va., 545;

Gartlan vs. Hickman, 56 W. Va., 75;

Teaff vs. Hewitt, 1 Ohio St., 511, 530;

- Tift vs. Horton*, 53 N. Y., 377;
Binkley vs. Forkner, 117 Ind., 176;
Eaves vs. Estes, 10 Kan., 314;
Edwards & Bradford Lumber Co. vs. Rank, 57
 Neb., 323;
Atchison, T. & S. F. R. Co. vs. Morgan, 42
 Kan., 23;
Hendy vs. Dinkerhoff, 57 Cal., 3.
Fred W. Wolf Co. vs. Hermann Sav. Bank,
 168 Mo. App., 549;
Wicks vs. Island Park Ass'n, 229 Pa., 400;
Baker vs. McClurg, 198 Ill., 28.

This intention may be indicated by an express con-
 tract between the vendor of the chattel and the owner of
 the land, such as a chattel mortgage or a contract of
 conditional sale, as was demonstrated by the numerous
 cases cited in our original brief, including *Hurxthal vs.*
Hurxthal, 45 W. Va., 584, and *First National Bank vs.*
Hyer, 46 W. Va., 13. Even the Massachusetts cases, so
 extensively relied on by the respondents, assert no dif-
 ferent principle, where the rights of no third party
 intervene.

- Hunt vs. Bay State Iron Co.*, 97 Mass., 279;
Southbridge Savings Bank vs. Exeter Machine
 Works, 127 Mass., 542;
Hopewell Mills vs. Taunton Savings Bank, 150
 Mass., 519;
Lorain Steel Co. vs. Norfolk & B. St. R. Co.,
 187 Mass., 50;
Haven vs. Emery, 33 N. H., 66.

Where an express contract exists, there is, of course,
 no difficulty in determining the intention with which a
 chattel was attached to the realty. But where no such

contract evidences the intention, the latter must be determined by the circumstances. And among the circumstances from which the intention is to be derived, are the situation and relation of the party making the annexation.

The influence of the situation and relation of the party is adverted to in *Van Ness vs. Pacard*, 2 Pet., 413, as follows:

"The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible and without exceptions. It was construed most strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade."

And this is concretely illustrated by a comparison of *Wiggins Ferry Co. vs. Ohio & Miss. R. Co.*, 142 U. S., 396, with *Dunham vs. Cincinnati etc. R. Co.*, 1 Wall., 254, and *Thompson vs. White Water, etc. R. Co.*, 132 U. S., 68, involving railroad tracks.

In *Binkley vs. Parker*, 117 Ind., 176, it was said:

"The question thus presented has been the subject of much discussion, and the result deducible

from the reported cases is not in every respect harmonious, or of so definite and precise a character as could be desired. Very much depends upon the relation which the persons between whom the question arises sustain towards each other;—whether it be that of personal representative and heirs of a deceased person, landlord and tenant, vendor and vendee, mortgagor and mortgagee, or some other which may give a peculiar character to the case."

In the leading case of *Teaff vs. Hewitt*, 1 Ohio St., 511, the rule was stated as follows:

"From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Appropriation to the use or purpose of that part of the realty with which it is connected; 3. The intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."

See also to the same effect:

Binkley vs. Forkner, 117 Ind., 176;

Eaves vs. Estes, 10 Kan., 314;

Baker vs. McClurg, 198 Ill., 28.

Now, it is obvious that where an owner of land annexes a chattel to it by physical attachment, or brings upon it a chattel necessary for the use or enjoyment of a structure on the land, such as a mill or factory, the presumption is strong that he intended the chattel as a permanent improvement of the realty. In *Tift vs. Horton*, 53 N. Y., 377, citing *Winslow vs. Merchants Ins. Co.*, 4 Mete., 306, the court say:

"As above stated, as a general rule, all fixtures put upon lands by the owner thereof becomes a part thereof, and subject to the lien of a prior mortgage; but sometimes it is doubtful if they have been so annexed as to so become. And then, it is said, the question may be decided by the presumed intent of the party making the annexation of the chattels. *Winslow vs. Mer. Ins. Co.*, 4 Mete., 306. The law makes a presumption in the case of anyone making such annexation, and it is different as the interest of the person in the land is different, that is, affixes for himself, with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence it permits annexations made by him to be detached during his term, if done without injury to the freehold, and in agreement with known usages. The law presumes that because the interest of the vendor of real estate, who is the owner of it, has been permanent, that he has made annexations, for himself to be sure, but with a view to a lasting enjoyment of his estate, and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest therein and the law presumes that improvements which he makes thereon, by the annexations of chattels, he makes for himself, for prolonged enjoyment, and to enhance permanently the value of his

estate. *Winslow vs. Mer. Ins. Co., supra.* These are presumptions of the intention of the tenant alone, the vendor alone, and of the mortgagor alone; nor are they ordinarily concerned at all, with the relation to the lands, or with the purpose of the landlord, or the vendee, or the mortgagee; though there may be cases in which the intention of both parties may be of effect, as where a mortgagee has loaned money with the understanding that it shall be applied to enhance the value of the estate by the addition of chattels in such manner."

Hence it is held, as in many of the cases cited by the respondents, where there was no contract with the vendor of the chattel, evidencing an intention to preserve the personal character of the chattel, that its annexation or appropriation for use in connection with the land by the owner thereof transformed the chattel into realty. And this transformation having been accomplished, the fixture became, on the one hand, immune from levy as personalty, and became, on the other hand, subject, as a part of the real estate, to a conveyance or mortgage thereof.

Patton vs. Moore, 16 W. Va., 428, cited by the respondents, has been referred to at length in our original brief, at page 23. The disputed property was brought upon the land by the owner of the realty, and was held to be part of the realty as against a *fieri facias*.

McFadden vs. Crawford, 36 W. Va., 671, was not materially different from *Patton vs. Moore*. The owner of the land brought the spike machines thereto, for the purpose of installing them in the mill. There was no

reservation of title or chattel mortgage, evidencing an intention to preserve the chattel status. Thereafter a creditor sought to attach the same as personal property, and it was held that the levy was invalid. Here again the common ownership of the land and machines, in the absence of evidence of a contrary intention, established the status of the machines as part of the land.

Lazear vs. Ohio Valley Steel Co., 65 W. Va., 105, as we pointed out at page 24 of our original brief, this case was decided solely upon the point of the receivers' excess of authority. Moreover, the *Lazear Case* was decided after the petitioner's contract was made and performed, and the petitioner is entitled to look to *Hurxthal vs. Hurxthal* and *First National Bank vs. Hyer* as the law controlling the case at bar. In respect to the reference in the opinion to the statute governing the recording of notices of reservation of title, we shall consider this case hereinafter.

In *Green vs. Phillips*, 26 Grat., 752, the owner of the land, and of the sash, blind and door factory thereon, installed the machinery for use in the factory. There was no chattel mortgage or reservation of title to any third party. It was held that the machinery was not subject to execution, but must be subjected to sale with the land. The case does not differ from *Patton vs. Moore* and *McFadden vs. Crawford*.

In *Shelton vs. Ficklin*, 32 Grat., 735, it was held that the machinery in a factory passed under a deed of trust as part of the realty. Here again there was the mere act of an owner of land, bringing thereon machinery necessary for the use of a structure on the land, with no contract evidencing an intention to preserve the chattel character of the machinery.

If by the citation of *Green vs. Phillips* and *Shelton vs. Ficklin*, the respondents seek to create the impression that under the law of Virginia, the intention to preserve as a chattel machinery attached to land, will not be accorded effect, that impression is not borne out by a later decision.

Monarch Laundry Co. vs. Westbrook, 109 Va., 382.

The Pennsylvania cases of *Voorhis vs. Freeman*, 2 Watts & S., 116, 37 Am. Dec., 490 (extensively quoted by the respondents on pages 27-32 of their brief, under the citation of *Frat vs. Whittier*, 58 Cal., 126), and *Ege vs. Kille*, 84 Pa., 333, are relied on. But the facts of these cases render them inapplicable. In *Voorhis vs. Freeman* the issue was as to the title to certain rolls, part of the machinery of a rolling mill. The rolls had been levied on and sold under a writ of *levari facias* against the land, and under a *feri facias* upon a judgment rendered subsequent to sale under the former writ. See the criticism of this case in *Teaff vs. Hewitt*, 1 Ohio St., 511. And in *Ege vs. Kille*, the sole question was as to the right of an adverse claimant of mining land, who was a *bona fide* purchaser for value and had lost the land in ejectment, to an allowance in an action of trespass for mesne profits, for mining machinery which he had erected on the land during his possession thereof. In both cases, the owner of the land, either real or supposed, made the annexation for the purpose of enabling him to use the land. There was no contract with any third person, coincident with the acquisition of the machinery, which indicated an intention to retain the machinery as personal property. There are, indeed, *dicta*, which to the indiscriminating may appear to support the views of the respondents. But the force of these

dicta disappear, when the exact facts are attended to. And if any doubt as to the effect of these cases remains, it is effectually dispelled by *Wicks vs. Island Park Ass'n*, 229 Pa., 400, referred to at page 30 of our original brief.

In *Wolford vs. Barter*, 33 Minn., 12, cited by respondents, the owners of a brewery executed a mortgage on the realty, and two years later executed a new mortgage covering certain casks, hogsheads, fermenting tubs and a copper cooler. In a contest between the two mortgagees, the chattel mortgagee prevailed, the court employing the language quoted at pages 63-65 of our original brief. The case is an authority for the petitioner, as the later decision in *Northwestern Mut. L. Ins. Co. vs. George*, 77 Minn., 319, referred to in our original brief, pages 32, 33, 60 and 61.

In *Smith vs. Altick*, 24 Ohio St., 369, the purchaser of a distillery agreed to execute to his vendor a purchase money mortgage on the day a deed therefor was executed to him. It was held that the purchaser could not remove apparatus, contained in the distillery at the time of its purchase, and before execution of the deed and mortgage to the prejudice of his vendor. We have no complaint to make of this case, and are unable to see that its facts mark any departure from the case of *Teaff vs. Hewitt*, which still remains the law of Ohio.

In *Equitable Trust Co. vs. Christ*, 47 Fed., 756, there was a mortgage on a brewery, in which the owner had installed for permanent use therein certain vats, a cask and a mash tub. Before a decree was obtained in the foreclosure suit the owner of the brewery executed a bill of sale, covering these articles. The court rightly decided that the owner of the brewery had appropriated

the articles to the use of the brewery, and made them part of the realty; for no contract with any vendor or chattel mortgagee accompanied them into his possession.

In *Farrar vs. Stackpole*, 6 Greenl., 154, it was held only that the conveyance of a saw-mill covered certain mill appliances, in place at the time of the conveyance. The appliances had been placed in the mill by the owner thereof, under no contract with any other person, and his intention to appropriate them to the purposes for which the realty was used, was manifest. But see the criticism of this decision in the leading case of *Walker vs. Sherman*, 20 Wend., 636, and distinction of it in *Teaff vs. Hewitt*, 1 Ohio St., 511.

In *Fratt vs. Whittier*, 58 Cal., 126, the question arose between the vendor and purchaser of hotel property. It was held that the gas fixtures, kitchen range, etc., passed to the vendee. No third party had reserved title or taken a chattel mortgage. The obvious intent of the vendor had been to improve his own real estate.

The respondents' quotation as from *Triplett vs. Mays*, 13 Ky. Law Rep., 874, is a *dictum* which found its way into their brief via the Century Digest. The case was as follows: A distillery was burned, and the machinery was thus broken, damaged and disconnected from the ground, so as to be of no value, except as old iron. After the fire, the land was sold to one who purchased it with the intention to excavate and sell the sand from it, and then use it for building lots. It was held that the old iron on the ground did not pass to the vendee.

(b)

CASES ADHERING TO THE MASSACHUSETTS RULE.

These cases, so earnestly relied on by the respondents, we fully discussed in our original brief, pages 35-38, 62 and 63. To that discussion we add nothing, except that our explanation of those cases is expressly borne out by *Crippen vs. Morrison*, 13 Mich., 23, and *Tift vs. Horton*, 53 N. Y., 377.

(c)

CASES IN THIS COURT, IN WHICH THE CHATTEL HAS BEEN INCORPORATED WITH THE REALTY.

The principal cases under this head are *Dunham vs. Cincinnati, etc. R. Co.*, 1 Wall., 254; *Galveston, etc. R. Co. vs. Cowdrey*, 11 Wall. 459; *Dillon vs. Barnard*, 21 Wall., 430, and *Thompson vs. White Water, etc. R. Co.*, 132 U. S., 68, involving railroad tracks, and *Porter vs. Pittsburg Steel Co.*, 122 U. S., 267, and *Toledo, D. & B. R. Co. vs. Hamilton*, 134 U. S., 296 involving bridges and docks, fully referred to and distinguished on pages 43-51 of the original brief.

While this brief is in proof we have received a copy of the opinion in *Holt vs. Henley*, decided March 16, 1914, by this Court. The decision in that case is a concrete answer to the argument of the respondents based on previous decisions in this court and completely supports the petitioner's contention.

(d)

CASES IN WHICH CIRCUIT COURTS OF APPEALS HAVE MISAPPREHENDED AND MISAPPLIED THE CASES IN THIS COURT.

Under this head fall *Tippett vs. Barham*, 180 Fed., 76, which was rightly decided, but wrongly reasoned; *Union Trust Co. vs. Southern Sawmill Co.*, 166 Fed., 193, incorrectly decided (Cf. *Cox vs. New Bern Light & F. Co.*, 151 N. C., 648); and *Phoenix Iron Works Co. vs. N. Y. S. & T. Co.*, 83 Fed. 757, and *Evans vs. Kister*, 92 Fed., 836, wrongly decided, unless they went upon the ground that the property was quasi-public. They are referred to in the original brief at pages 51 and 52. Against these cases we oppose *Holly Mfg. Co. vs. New Chester Water Co.*, 53 Fed., 492, affirming 48 Fed., 879; *Re Sunflower State Ref. Co.*, 195 Fed., 180, and *J. L. Mott Iron Works vs. Middle States etc. Co.*, 17 App. D. C., 584.

Re Williamsburg Knitting Mill, 190 Fed., 871, affirmed *sub nom. Holt vs. Henley*, 193 Fed., 1020, merely marks the persistency in error of the Circuit Court of Appeals for the Fourth Circuit, and the latter case decided by this court March 16, 1914, not only establishes the error in the decisions of the same case in the lower courts, but goes far to overturn the other cases in the Circuits Court of Appeals relied on by the respondents.

IV.

THE RECORDING STATUTE OF WEST VIRGINIA.

In our original brief, pages 66-69, citing *U. S. vs. New Orleans R. R.*, 12 Wall., 362, and numerous other authorities, we pointed out that a prior mortgagee, even though his mortgage contains an after-acquired property clause is not within the protection of the recording statutes, and that a contract reserving title, though unrecorded, is nevertheless valid as against such a mortgage. And see *Campbell vs. Roddy*, 44 N. J. Eq., 244, and *Re Sunflower State Ref. Co.*, 195 Fed., 180.

We pointed out, also, that not one dollar of the proceeds of the bonds, here in question, went into the construction of the brewery or the purchase of these tanks. Pages 2, 3, 71 and 72 of original brief. Consequently no exceptional equity arises in favor of the bondholders in the case at bar.

The respondents, notwithstanding these authorities, cite the recording statute of West Virginia, quoted in our original brief, pages 3 and 4, and refer to an absurd dictum in *Lazear vs. Ohio Valley Steel Co.*, 65 W. Va., 105, reading as follows:

“With respect to the position of the appellants, it is quite true that the statute gives right of reservation of title to goods and chattels sold as security for unpaid purchase money, but that statute has strict application to goods and chattels.”

We assent to this *dictum*, and it is nothing else, so far as it lays down the proposition that the statute relates only to goods and chattels; for it is to that extent, and only to that extent, true. But it is not true that the statute gives the right to reserve the title as security. That right is not the creature of the statute. Contracts of sale, reserving title, were and are obligations perfectly well known and valid at common law, and in most states valid even as against *bona fide* purchasers from and creditors of the vendee.

Harkness vs. Russell, 118 U. S., 663;

Coggill vs. Hartford, etc. R. Co., 3 Gray, 545;

McComb vs. Donald, 82 Va., 903.

Cole vs. Berry, 42 N. J. Law, 308.

6 *Am. & Eng. Encyc. Law* (2 ed.), 440, 441,
486-494.

The statute in regard to recording contracts reserving title, is substantially the same as that relating to the recording of deeds, deeds of trust and mortgages. And it is well settled that those instruments are valid, as between the parties thereto, even though not recorded.

Guggenheimer vs. Lockridge, 39 W. Va., 457;

Morgan vs. Snodgrass, 49 W. Va., 387.

Such instruments are valid, though unrecorded, as against subsequent purchasers with notice.

Abney vs. Ohio Lumber & M. Co., 45 W. Va.,
446.

We note, in passing, that a person secured by a deed of trust or mortgage is a purchaser, and not a creditor, within the meaning of the recording statute.

Cox vs. Wayt, 26 W. Va., 807, 817.

Weinberg vs. Rempe, 15 W. Va., 829, 858.

And the creditors within the protection of the statute are lien creditors.

Birch River Boom & L. Co. vs. Glendon Boom & L. Co., 71 W. Va., 507;

Moore vs. Tearney, 62 W. Va., 72;

Gilbert et al. vs. Peppers et al., 65 W. Va., 355.

The foregoing authorities plainly establish the incorrectness of the *dictum* in the *Lazear Case*, insofar as it assumes to lay down the proposition that the right to reserve title is a creature of statute.

But the fallacy of the *dictum* appears in another aspect. The statute does not purport to determine what is, or is not, a chattel. It does not assume to limit or modify the common law doctrines relating to fixtures. It does not undertake to prohibit the parties to a contract from providing by their agreement that the chattel delivered, shall continue its character as a chattel, until it is paid for. It does no more than provide that, for the protection of those persons who are entitled to protection under the recording law, notice of the reservation shall be recorded. To say what shall be a chattel, and to say that contracts respecting a chattel shall be recorded, are two very different things.

V.

THE ALLEGED WAIVER OF TITLE BY
PETITIONER.

It is gravely argued on the other side that the petitioner waived its title to the tanks by its failure to require payment in strict accord with the terms of the contract, and by its delay in asserting the title reserved by it. It might suffice to say that no question is raised by the answer, nor was it urged in the lower courts. It comes as after-thought, and is entirely without merit.

The contract itself is a complete answer to the objection made. The contract reads in its material parts, (Rec., pp. 22, 33) :

"It being expressly agreed and understood that the title and ownership of all the tanks and fixtures covered by this proposal shall remain in us until all the payments as herein specified, and ANY NOTES AND ACCEPTANCES THAT MAY BE GIVEN ON ACCOUNT OF ANY SUCH PAYMENTS, shall have been fully paid; and in case of default in any of the payments, notes or acceptances, we shall have the right at our option to take possession of and remove said tanks and fixtures."

• • • • •

"The payments of the above purchase price shall be made as follows: \$2,000.00 when all of the tanks have been shipped. \$740.00 when erected, Brewery and tested. \$2,740.00 in the form of promissory note, payable in three months from date with 6 per cent. interest per annum."

The payment of cash and execution of notes provided in the contract were not performed precisely as therein provided. A note for \$2,740 was made by the borrower for immediately after the cash was shipped, and \$1,000 paid a little later on. (Rec., pp. 80, 81). Later the part of the price not paid in cash was evidenced by two notes dated December 1, 1908, for \$2,581.18 and \$2,000 respectively. (Rec., pp. 88, 89). On the ground of this departure from the precise terms of payment the respondents found their argument of waiver.

But when all is said and done the very contract itself contemplated that there might be a change in the form and manner of payment. The reservation of title was made:

* * * "Until all the payments as herein specified and any notes and acceptances that may be given on account of any such payments shall have been fully paid."

This reservation plainly contemplated that the parties might do, without impairment of the reservation, exactly what was done.

The case of *Shaw-Walker & Co. v. Walker & Co.*, 100 Cal. 441, 33 P. 244, is directly in point. The contract between the plaintiff and the defendant was for the purchase of a certain quantity of goods, and a part of the price was to be paid in cash and the rest in notes. The cash was not paid, but the vendor instead took a mortgage on other property to secure the payment of the cash installment. The real estate mortgages claimed that the reservation of title was thereby waived. The court

overruled this contention, the decision being merely stated in the syllabus of the report in 22 Pac. 740, as follows:

"Where chattels are delivered upon an agreement to pay half the price in cash, conditional sale notes being given for the other half, and the cash payment is not made, taking other security for such cash payment does not impair the vendor's right to retain title until the notes are paid."

Three of the cases chiefly relied on by the respondents are *Chapman vs. Lathrop*, 6 Cow., 110; *Furniss vs. Hone*, 8 Wend., 248; and *Lupin vs. Marie*, 6 Wend. 707.

In these cases there was no express reservation of title but the mere common law implication that upon a sale of goods where nothing is said to the contrary, payment and delivery are concurrent conditions, and that delivery by the vendor without exacting payment, is an absolute delivery, precluding the vendor from claiming possession thereafter. See *Leonard vs. Davis*, 1 Black, 476.

Peabody vs. Wagoner, 70 Mo. 372, 12 Att. 631, cited by respondents was not essentially different. There was no express reservation of title, but only an agreement that payment should be made in cash, with a stipulation as to time for making such payment. It was held that the payment of working of the mill and its consequent with the delivery of the mill from the common law implication. The vendor did extend the contract, making nothing whatever about payment. There had been some communications between the parties, and the vendor's financial circumstances were supposed to be good. On these grounds the court

held that there was a presumption of waiver of the implied condition that payment should be made or note given at the time of delivery. The presumption arose out of the peculiar facts of the case.

The authorities show that the waiver of payment as a condition of delivery, is founded on no universal rule of law, but out of the presumed intention of the parties, which will not control if it otherwise appears that the delivery was not intended to be absolute, but merely conditional; and that a conditional delivery need not be accompanied by any express declaration to that effect, but it is sufficient if it appears that such was the understanding of the parties. The principle is well summed up, with citation of many authorities, in Cyc., 328, as follows:

"The fact that there has been a delivery without requiring payment or security does not, however, necessarily constitute a waiver of such condition, but merely creates a presumption to this effect, which will not control if it otherwise appears that the delivery was not intended to be absolute but was merely conditional. Whether the delivery is conditional or unconditional depends primarily upon the intention of the parties as shown by the facts and circumstances of the case, and will constitute a condition of sale for the goods. It will be for such the mere acceptance of a check or note constitutes an absolute payment or waiver of the condition as to payment.

When the seller delivers the goods conditionally and without any intention of waiving payment or security the property does not pass, and, in order to render a delivery conditional within the application of this rule, it is not necessary that

there should be any express declaration to that effect, but it is sufficient if it appears that such was the understanding of the parties, or that the delivery was made in the expectation of immediate payment, the question being primarily one of intention as shown by all the facts and circumstances of the case, although a mere secret or undisclosed intention on the part of the seller is not of itself sufficient to make the delivery conditional. So if the seller delivers on an understanding express or implied that he is to receive immediate payment or security he may reclaim the goods, or if he delivers on payment by check in lieu of cash and the check is dishonored he may reclaim the property."

We fail to see how the intention of the parties that delivery was not a waiver of payment, but was only conditional, could more plainly appear than from the express contract under which the delivery was made.

The one case cited by the respondents involving a conditional sale is *Matthews vs. Smith* (Del.), 31 Atl., 879. This was a charge to a jury in the superior court. The property had gone into the possession of a purchaser for value without notice, from the conditional vendee. Evidently the contract was not recorded, or there was no provision for recording. The charge embraces no reasoning and cites no authorities, but manifestly went on the ground that by the delay of nine months the conditional vendor held out the vendee as an absolute owner, and therefore waived his right as against the subsequent purchaser. The case can have no application to the case at bar, wherein the act of the respondent manifested an intention to rely on and as-

sert its reservation of title, and especially as against the bondholders claiming under a prior mortgage, who were not subsequent purchasers and parted with nothing in reliance upon the supposed waiver.

The New York cases relied on by the respondents, if applicable, would prove entirely too much; for if delivery were a waiver of the condition, under an express reservation of title, there never could be an effectual reservation of title or other conditional sale.

That the petitioner did not obtain cash and notes in the proportions and form specified in that part of the contract relating to terms of payment goes for nothing. The analogous cases of mortgages, deeds of trust and vendor's liens show that the debt is the principal thing, and that whatever changed form it assumes, whether as a renewal note, a judgment, or the like, the security still stands for the indebtedness.

2 Jones, Mort., (2 ed.), Sec. 924.

Flower vs. Elwood, 66 Ill., 438.

Knisely vs. Williams, 3 Grat., 253.

Stimpson vs. Bishop, 82 Va., 190, 198.

Norris vs. Lake, 89 Va., 524.

The same doctrine has been applied to contracts reserving title.

Hollenberg Music Co. vs. Bankston (Ark.),
154 S. W., 1139.

Beall vs. Hudson County Water Co., 185 Fed.,
179.

In support of petitioner's position see also the case of *Page vs. Edwards*, 64 Vt., 124.

It is hardly necessary to cite authorities in support of the elementary proposition that the giving of a note is not absolute payment, unless there be an express agreement to that effect, but only operates to extend until maturity the period of payment of the debt.

The Kimball, 3 Wall., 37, 45.

Scyrist vs. Crabtree, 131 U. S., 287.

Merchants Nat. Bank vs. Good, 21 W. Va., 455, 464, 465.

First Nat. Bank vs. Handley 48 W. Va., 690.

As to delay in asserting the petitioner's title, it is hardly necessary to speak. The bondholders claim under a prior mortgage. Neither they nor anyone else was misled by the short delay. The petitioner was first apprised that its title was questioned by the fraudulent and collusive decree in the Hartman case, rendered on October 30, 1909. This bill was filed on December 22, 1909. In the interval between the installation of the tanks and the date of the filing of the petitioner's bill, there was no change of position on the part of the bondholders or anyone else. We submit that there was no waiver and no laches on the part of the petitioner.

Respectfully submitted,

ORLA B. TAYLOR,
CHARLES N. KIMBALL,
WALTER S. SUGDEN,
GEORGE M. HOFFHEIMER,
Counsel for Petitioner.



7
FILED

APR 9 1914

JAMES D. MAHER

CLERK

Supreme Court of the United States

No. 368 OCTOBER TERM, 1913.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,

vs.

**SISTERSVILLE BREWING COMPANY, GALE JUSTUS,
R. H. SKAGGS, F. HOGENMILLER, et al.,
Respondents.**

**On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.**

REPLY BRIEF FOR RESPONDENTS.

**ARLEN G. SWIGER,
THOMAS P. JACOBS,**
Counsel.

TABLE OF CASES CITED.

—B—	PAGES
Bearlake Irrigation Co. vs. Garlon, 164 U. S., 1.....	25
Branch vs. Jesup, 106 U. S., 478.....	19
—F—	
First British Ruling Cases, 25.....	5
First National Bank vs. Hyer, 46 W. Va., 13.....	3, 9, 20
Fosdick vs. Schall, 99 U. S., 239.....	25, 29
Fry vs. Shipley, 94 Tenn., 252.....	28
—G—	
Galveston, etc., R. R. Co. vs. Cowdrey, 11 Wall., 459	19, 23, 26
Gartlan vs. Hickman, 56 W. Va., 75.....	3, 10, 11, 12
—H—	
Hurxthall vs. Hurxthall, 45 W. Va., 584....	3, 8, 9, 20, 30
—K—	
Kuhn vs. Fairmont Coal Co., 215 U. S., 349.....	4, 14
—L—	
Lazear vs. Steel Foundry Co., 65 W. Va., 105	3, 4, 12, 13
—P—	
Patten vs. Moore, 16 W. Va., 248.....	4, 7, 12
Pennock vs. Coe, 23 Howard, 117.....	19
Porter vs. Pittsburg Bessemer Steel Co., 122 U. S., 282.....	19, 23, 24, 27

—T—		PAGES
Thompson vs. Whitewater Valley R. R. Co.,	132	
U. S.,	68.....	19
Tippett & Wood vs. Barham,	180 Fed., 76....	19, 22, 23, 26
Toledo, etc., R. R. Co. vs. Hamilton,	134 U. S.,	
418		19

—U—		
Union Trust Co. vs. Southern Sawmills Co.,	166	
Fed.,	193	19, 22
U. S. vs. New Orleans R. R.,	12 Wall., 326..	21, 25, 27, 29

—W—		
Webster Lumber Co. vs. Keystone Lumber Co.,	31	
W. Va.,	545.....	3, 10

INDEX.

Application of Massachusetts Rule in West Va.....	20
Assignments of Error.....	2
Bids Received at Foreclosure Sale.....	8
Cause Determined by Law of West Va.....	2
Character of Mortgage.....	16
Common Law Mortgage.....	17
Cooperage Company Waived its Rights.....	15
Determination of Law in State of W. Va. and 4th Judicial Circuit	5
Doctrine of First British Ruling Cases.....	5
First National Bank vs. Hyer discussed.....	9
Force and Effect of an Adjudicated Case.....	3

	PAGES
Gartlan vs. Hickman discussed.....	11
Integrity of the Plant.....	6
Intention of Cooperage Company.....	11
Jurisdiction	2
Lazear vs. Steel Foundry Company discussed.....	4
Lazear case no Departure from General Rule.....	13
Loose Property	26, 27, 28
Majority Rule	14
Massachusetts Rule	7
Measure of Damages	30
Minority Rule	14
Mortgage Receives After-Acquired Property.....	18
Origin of Doctrine of Fixtures.....	16
Patton vs. Moore not at variance with Hurxthall case	4
Porter vs. Pittsburg Steel Company discussed.....	24
Quasi Public Corporations.....	22
Removal of After-Acquired Property from Free- hold, when	18
Removal of Fixtures.....	23
Tanks necessary to the Operation of the Brewery....	29
U. S. vs. New Orleans R. R. Co., discussed.....	21
Webster Lumber Co. vs. Keystone Lumber Co. dis- cussed	10

Supreme Court of the United States

No. 368 OCTOBER TERM, 1913.

DETROIT STEEL COOPERAGE COMPANY, Petitioner,

vs.

SISTERSVILLE BREWING COMPANY, GALE JUSTUS,
R. H. SKAGGS, F. HOGENMILLER, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fourth Circuit.

Reply Brief of Respondents.

We compliment counsel for petitioner for their great industry exhibited in the preparation of their brief more than for their discrimination in the selection and analysis of the cases.

While we do not regard it as necessary to make reply to said brief, we do regard it, at least, as desirable to do so; and shall confine our reply brief to a consideration of certain of the cases cited by the learned counsel; but not to a review of all of said cases, nor even to a majority of them. We believe that causes are determined by the weight of authority, and not by the number of citations.

We shall spend no time on a further statement of the facts in the case, as that has been sufficiently done heretofore, nor, shall we spend much time upon the assignments of error made by counsel for petitioner. There are eighteen different assignments of error, and many of those errors assigned are mere repetitions.

For instance, errors Nos. 12, 14, 15, 16 and 17 are practically one, in which counsel make an assault upon the jurisdiction of the District Court as to its want of jurisdiction in the case of *George W. Hartman, et al., vs. Sistersville Brewing Company, et al.*

We insist that this Court will not undertake to decide the question whether the District Court had jurisdiction or not. The fact is it had jurisdiction to enforce the trust mortgage on the equity side, and did enforce it. Counsel can not attack the decree in that case collaterally. The court had jurisdiction of the subject matter and of the parties, and, therefore, its jurisdiction is not reviewable collaterally in this cause.

On page 10 of their brief, counsel for petitioner seem to have conceded that in the case of *George W. Hartman, et al., vs. Sistersville Brewing Company, et al.*, the District Court did have jurisdiction and authority. They seem, therefore, to have waived any further insistence upon that point.

We agree with counsel for petitioner that this cause and the title to the tanks in question, must be governed and determined in accordance with the laws of the State of West Virginia as expressed by the decisions of its Supreme Court.

The relative rights of the bond-holders under the mortgage on the one hand, and of the petitioner under its reservation of title on the other hand, we deny are to be absolutely determined by the decisions of the Supreme Court of Appeals of West Virginia rendered prior to the making of the conditions of the sale and the breach thereof; but rather by a consolidation of all the West Virginia cases, both those decided before that fact and those decided afterwards, for it is laid down by the said Supreme Court of West Virginia that a cause decided determines not only what the law of that case is, but that the same has been law for all time.

Counsel for petitioner refer to our citation as expressing a "Modern and Progressive Doctrine," as found in the case of *Lazear vs. Steel Foundry Co.*, 65 W. Va., 105, and certain decisions of this court. The holdings in that case were the law of the State of West Virginia long before that case was decided.

We desire, in considering the cases cited by counsel for petitioner, to lay down this proposition,—**THE BINDING FORCE AND EFFECT OF AN ADJUDICATED CASE IS COMMENSURATE ONLY WITH THE FACTS UPON WHICH IT IS PREDICATED.** Measured by this rule, many of the cases cited ought not to require the attention either of the court or of counsel. It is a useless consumption of time.

The cases of *Hurxthall vs. Hurxthall*, 45 W. Va., 584; the *First National Bank vs. Hyer*, 46 W. Va., 13; the *Webster Lumber Co. vs. Keystone Lumber Co.*, 31 W. Va., 545; and *Gartlan vs. Hickman*, 56 W. Va., 75, when analyzed and considered, do not support the contention of counsel for petitioner in any sense. The

facts in those cases are not the same, nor similar, as those in the cases at bar, and are not supported, so far as they are applied to this cause, by their reason.

We deny emphatically the proposition advanced on page 18, that the case of *Patton vs. Moore* is at variance with the *Hurthall* and other later decisions; or that the case of *Patton vs. Moore* must be taken to have been superseded. It is not superseded in any sense.

Nor is the proposition advanced on the same page, that the case of *Lazear vs. Steel Foundry Co.* conflicts with previous decisions of the same court, true. It is true that the *Lazear Foundry Co.* case was decided after the contract was made and petitioner's right of action had accrued, but that does not argue that the rights of the petitioner were at all effected, nor that it was entitled to have its contract interpreted or its rights determined by previous cases and not by the *Lazear Foundry Co.* case as above cited. The law, as decided in the case of *Lazear vs. Steel Foundry Co.*, always has been law, was law at the time petitioner's right of action accrued, and applies to the case although decided after its right accrued.

The case of *Kuhn vs. Fairmont Coal Co.*, 215 U. S., 349, etc., has no relation to the case at bar, except that it holds in effect that the Federal Courts will follow the line of decisions in the State Courts, so far at least as it respects the title and rights to property, both real and personal. So, we think it not worth while to review the other cases cited pursuing the said case of *Kuhn vs. Fairmont Coal Company*.

We deny the second proposition as laid down on page 19 of brief for petitioner, to wit: "That the tanks

were placed in the brewery under a valid reservation of title, which was superior to the mortgage, though the latter was prior in point of time"; and we deny that the mortgage could attach to the tanks only subject to such condition as accompanied them into the possession of the Brewing Company.

Counsel for petitioner concede that the authorities touching this question are in conflict, and say that it is impossible to reconcile all of them, although some apparently contradictory decisions are reconcilable if due consideration is given to the facts and the relation of the particular parties involved.

We are concerned especially in determining what the law is in the State of West Virginia and the Fourth Judicial Circuit; and we believe that the weight of authority, in fact the whole authority on that subject in the said State and in said Fourth Judicial Circuit, is with the respondents. We decline therefore to be betrayed into a great line of cases coming from various States, and even coming from England, on the subject.

It can do us no harm to admit that in the majority of the cases in the State courts peculiar rulings have been held by them which are not even persuasive on us in this case. We deny especially the doctrine cited on page 20 of the brief for petitioner, in *1st British Ruling Cases*, 25 (Lawyers Co-Operative Publishing Co.), in so far as it is claimed to be a ruling case in favor of the petitioner. We admit the quotation from that cause is properly made, but that quotation holds as follows:

"The doctrine that where the fixture may be removed without material injury the seller may en-

force his lien against a prior mortgage of the realty, is applicable where the seller of the fixture has taken a chattel mortgage thereon."

So, even English doctrine is not absolutely and without exception with the petitioner.

We deny that the rule from *1st British Ruling Cases* is based upon the principle that the real estate mortgagee is deprived of nothing by way of security which he had or was entitled to at the time when he took the mortgage, and that it is equitable that the intention expressed in the contract of conditional sale or chattel mortgage should be enforced. That proposition is absolutely without support. If that were true, then a mortgage containing an after-acquired clause would have no more force and affect than one without such clause.

At this point we desire to repeat that the determining feature is whether the fixture is put into the plant with the intent and purpose of making it a part of the plant; and that if so placed in the plant it never can be removed, because it destroys the integrity of the plant as a whole. This case is not to be determined by the degree of permanency with which a fixture is placed in a plant, in any sense. If the removal of it *destroys* the *integrity* of the *plant*, and, therefore, *dismantles* the *plant* as a *going concern*, the question must be decided in favor of the respondents, regardless of what may have been expressed in the contract of conditional sale or chattel mortgage.

Without repeating too much, it is very proper and right to say that many pieces of machinery placed in

manufacturing plants do not need to be fixed physically to the ground or to the walls, or in any other manner, but that mere gravity will hold them in place.

In a brewery the engine, pipes, tanks, tubs, vats, bottling machines, washers, and all other things necessary in a complete brewery, are simply put in place, and by unscrewing a few taps all the smaller articles might be removed by opening a door; although, of course, the tanks could not be removed without dismantling and destroying a wall. Why the necessity of fastening the tanks to the ground or walls when the only manner of placing such tanks in a brewery is upon the ground or a floor where they are held in place by gravity? As we repeat, the determining feature is not that they are fastened, but that, as in *Patton vs. Moore, supra*, where they were intended to become a part of the going concern, they are a part, although not yet annexed.

Counsel for petitioner criticized what is called the "Massachusetts Rule," or decisions where it is held that the real estate mortgagee is entitled to the benefit of all annexations to the realty, and that he cannot be deprived of his right by any act of, or agreement between a conditional vendor and vendee or chattel mortgagor and mortgagee to which he has not given his consent.

We agree with counsel for petitioner that this Massachusetts rule has been adopted in various other States, and it stands at the head of a long line of decisions both in State and Federal Courts. That it is approved by the Supreme Court of Appeals of West Virginia is shown by cases already cited by us in our brief, and it is also approved by the United States Circuit Court of Appeals in the Fourth Judicial Circuit.

It is also conceded that the local law of West Virginia is not doubtful. It is the rule, certainly, supported by the weight of authority submitted in respondent's brief; but the Massachusetts line of decisions does not sustain the contention of petitioner that the reservation of title under which the tanks were placed in the brewery was superior to the mortgage, when the latter was superior in the matter of time. Nor, is it true that the mortgage could attach to the tanks only subject to the conditions which accompanies them when they came into the possession of the Brewery Company.

In the case of *Hurrthal vs. Hurrthal*, 45 W. Va., 584, we insist the true interpretation of this decision does not aid the petitioner in the slightest degree. In this case the milling machinery purchased and put into a mill subject to a deed of trust, was found to be easily removed through openings already made in the mill; and while it is a short and thoroughly considered opinion, yet it does not militate against the doctrine, in any sense, which we insist upon.

In the case at bar, it is not true as stated on page 61 of petitioner's brief, that at the foreclosure sale one of the bondholders bid only \$500 for the tanks, but it is true that Franklin P. Iams bid \$500 for the tanks alone, and \$4,000 for the brewery without the tanks; and that S. W. Bollinger *et al.*, bid the \$10,000 for the brewery complete. Counsel for petitioner say that this is not an impressive fact, especially when those bids were made pending the suit by the bondholders and their associates, who were at the time engaged in contesting the petitioner's claim. While counsel may be right in saying that it is not impressive in their minds, it is the very rule which is laid down in the case of *Hurrthal vs. Hurr-*

that, supra, which counsel for petitioner rely upon. If the petitioner has even the slightest right to any thing in this case, that right would be measured by the sum of \$500, the amount bid by Mr. Franklin P. Iams for the tanks. As authority for this statement, we cite from the case of *Hurxthal vs. Hurxthal*, page 587:

“If together they bring a larger sum than when offered separately, the difference between the two sums will show the amount to which the realty mortgagee would be damaged by a separate sale; while the personal mortgagee would be only entitled to what it would bring if sold separately, because such is the extent of his mortgage.”

The case last cited does not determine the merits of this case on account of the fact that the court found in that case that the small quantity of machinery put into the mill was easily removable, and without material damage to the mill. That case was reversed and sent back for further proceedings.

We apprehend that this court will not decide the case at bar upon the authority laid down in the case of *Hurxthal vs. Hurxthal*.

In the case of *First National Bank vs. Hyer*, 46 W. Va., 13, it appears that there was a sawmill erected on land which was subject to a lien for the purchase money, and the court decreed the sale of the real estate ONLY, and not of the mill; and the sale of the mill was expressly reserved by the decree in that case. In the said cause, the reservation of title was upon a boiler until the purchase money should be paid. This boiler would seem to be easily removed as it does not appear to have been installed inside of the mill; and does not militate

against the doctrine which we advance. For a purpose which appeared proper to the court, the real estate was sold, but the sale of the mill was expressly reserved. Judge Brannon in that case (page 15) says:

"If the claim of Smith, Myers and Shyer, retaining title to the machinery sold by them to the Braxton Coal Company had been properly presented to the court, it is likely that the exception found in the decree would have been proper, since machinery already under mortgage which is annexed to the freehold, which freehold is already under mortgage, becomes part of the freehold and therefore subject to the mortgage if it cannot be severed without material injury to the freehold."

In *Webster Lumber Company vs. Keystone Lumber Company*, 51 W. Va., 545, it is laid down in brief, that the chattels were not delivered to the owner of the realty; and it is further held in that case that Chapter 74 of the Code of West Virginia heretofore cited does not apply unless the chattels or personalty have been delivered in fact to the buyer.

In *Gartlan vs. Hickman*, 50 W. Va., 75, it is said by counsel that the chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent annexation to the freehold.

Let us, for the purposes of this case, concede that, after the Detroit Steel Cooperage Company made this contract with the Sistersville Brewing Company on the terms already stated in the brief, it delivered the chiptanks on the ground, turned them over to the actual possession of the Brewing Company; it, the Brewing

Company, had agreed to pay \$2,000 in cash upon the shipment of the tanks, which it did not do, and yet the Detroit Steel Cooperage Company shipped those tanks contrary to the terms of the contract and delivered them as aforesaid upon the ground and at a time when the said mortgage upon the freehold was in existence and had been for a year or more. It not only did not reclaim the tanks, nor attempt to enforce its conditional contract when it was found that the Brewing Company did not pay the \$2,000, but on the contrary it sent expert mechanics to the Brewery to install the said tanks, and did install them.

It can not be said that there is any question, therefore, about the intention of the Detroit Steel Cooperage Company that the possession of the tanks should pass to the Brewing Company, and that the tanks should be installed as a permanent part thereof.

Taking it as assumed by counsel for petitioner, that the chief test is one of intention, the case of *Gartlan vs. Hickman*, *supra*, must be held not to be an authority for petitioner in this case; but on the contrary, an authority in favor of the respondents.

We further call attention to the case of *Gartlan vs. Hickman*, mentioned above, to the fact that the loose property placed upon the land was not upon a freehold but were placed therefor the purpose of operating the land for oil and gas purposes, and, of course, did not attach to the freehold, and were always removable. In cases where Oil Companies develop land for oil and gas purposes, after development they remove the same. On page 85 of the case last cited, it is said in the opinion that engines, tanks, and oil fixtures are not placed

upon a farm for the purpose of enhancing the value of the farm, but for the purpose of extracting oil and **gas**; and not with the intention of either party that they should become a part of the freehold.

Quoting further from that opinion, on page 86, we find the following:

"The question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and the manner in which they are to be used."

This is certainly the law in West Virginia. The case of *Garlan vs. Hickman* aids the petitioner far less than it does the respondents.

The case of *Patton vs. Moore*, 16 W. Va., 248, already cited by us, has been approved by the United States Circuit Court of Appeals. We deem it unnecessary to review that case. It is not over-ruled nor modified. It stands as the law of West Virginia to this day. It is true there was no reservation of title in that case, but there was what was equally as effective, the sheriff levied an execution upon the buhrs which were lying on the ground not yet affixed, and the court enjoined the sale of the same. The lien of the execution was certainly just as effective as the lien by way of reservation or otherwise.

Nor is it necessary for us to review the case of *Lazear vs. The Ohio Valley Steel Co.*, 65 W. Va., 105, further than to say that that case does not indicate any departure from the rule already established in the State of West Virginia. It does not make, as we conceive,

any difference when the case of *Lazcar vs. Steel Co.* was decided, whether before or after the so-called conditional sale to the Sistersville Brewing Company. It was then, it was before, and it has been ever since the law of West Virginia.

We deny that the said *Lazcar case* is in any sense a departure from the general rule. It is true that the court in that case uses this language:

"In all the cases referred to we have none like the case at bar involving the contract of a special receiver."

It is also true that in the *Lazcar case* receiver's certificates were ordered issued and sold in order to complete the plant. This was done before the machinery was furnished, and had the same force and effect as a prior mortgage already executed on the plant. The court did not decide the case upon the fact that receivers' certificates had been issued, because the right of the furnisher of machinery to complete the plant was just as secure as if no receiver's certificates had ever been provided for. We fail to find anything in that case that shows that the fact that receiver's certificates were issued with which to complete the plant played any part whatever in determining the right of the party who furnished the machinery. The distinctive feature in that case is that the machinery was placed on the ground, and was that without which the Ohio Valley Steel Company would have been nothing but a mere shell. It would not have been a plant for the manufacture of anything whatever. That machinery stood upon the ground unenclosed by either walls, fences, or in any other manner. It was necessarily attached to other machinery only for the purpose of communicat-

ing power to it from the power plant, and that attachment could have been released by unscrewing not more than three little screw taps, and the machinery removed from the premises. It was held there by force of gravity and not by taps and bolts. The taps and bolts were used only to connect the power from the power plant to the machinery.

Counsel for petitioner insist that there are two rules, a "Majority Rule" and a "Minority Rule." No such thing is known in the domain of practical law. We have said that cases are decided by the weight of authority, and not by the number of citations; therefore, there is no such thing as "majority rule" and "minority rule."

If counsel for petitioner insist on the "majority rule" and "minority rule," then it is very likely that with all of their diligence they would search out and present every case which was either remotely or directly connected with their theory of the case, as they have cited many cases to no purpose except to burden counsel and court, as for instance, the case of *Kuhn vs. Fairmont Coal Co.*, 250 U. S., 249, etc., which cannot help in this case though it may have furnished a good deal of pleasure to counsel who reviewed it. We decline to be bound by the so-called "majority rule," if it be a "majority rule."

A great number of cases are cited on page 25 of counsel's brief which it would be a weariness of the flesh to recite and distinguish, and we decline to pay any attention to them. They then lay down this as a doctrine: "that where the fixture may be removed without material injury, the seller may enforce his lien as against the prior lien of the mortgage, as applicable

where the seller of the fixture has taken a chattel mortgage thereon." Now, there are cases, and there are cases cited by the learned counsel, where the right to remove chattels from a building or plant is determined by the ease with which they may be removed. Those cases have no bearing or authority in this case. Let us stop a moment and see why.

The tanks were placed in the brewery by the Detroit Steel Cooperage Company and it did not insist upon the terms of the contract and so waived their right to enforce the payment of the first debt of \$2,000 at the time the tanks were shipped. It then installed the tanks in the brewery, as we have said, in the only manner in which such tanks are installed. The aperture through which they were placed was then sealed up substantially by brick and mortar and cement. There are two substantial and prevailing reasons why these tanks cannot be removed, notwithstanding the "Majority Rule," so-called. One is that the possession was delivered to the Brewing Company without requiring a performance of the contract. The other is that the tanks were put in place for use in the brewery. Two further reasons are, that the brick walls of the brewery through which these tanks were carried, were fastened up and walled up; and that the brewery was not, and could not, be a brewery, as agreed by counsel for petitioner, without the tanks, and to remove them would be, as we have said, a destruction and dismantlement of the brewery plant, and without these tanks it could not manufacture beer.

We admit, in one sense, that if the rule of force and violence is to be used everything in the brewery could be taken out by knocking down and destroying

the walls; and the first mortgage would be only as to the building itself. This is not the doctrine of these days.

It must be borne in mind that the doctrine of fixtures originated in England centuries ago in the time of simple things, such as small tanneries, soap factories, shoe making establishments, looms, spinning apparatus, etc., but in these modern times, without using the language of counsel for petitioner in the sarcastic sense in which they have used it, to wit, a "modern and progressive doctrine," we are convinced, whether we call it a modern and progressive doctrine or not, is the true doctrine; and is the doctrine insisted upon by us.

Counsel for petitioner are kind enough to cite some cases, on page 27 of their brief, in opposition to their doctrine, but are shrewd enough to cite only a portion of the cases and those of at least applicability to this case. They do cite the Massachusetts rule and a few cases supporting it, which holds that the rights of the mortgagee can not be affected by an agreement to which he is not a party, and holds that such rights are superior to those of the seller retaining title to chattels or personalty.

We insist that the Massachusetts doctrine is the true rule in the State of West Virginia, and is the true rule in the Fourth Judicial Circuit as well as in the State of Virginia, the mother State.

Counsel for petitioner insist that what distinguishes the Massachusetts doctrine from the doctrine of other States, and what ought to distinguish it from the doctrine of the State of West Virginia is the character of the mortgage. It is true that the State of

Massachusetts has the common law mortgage,—so has the State of West Virginia, it was never abolished. But the State of West Virginia has gone a step farther and has provided for a Deed of Trust which grew up from Colonial days. This is a common law doctrine which has been regulated more or less by statute. In the deed of trust, property is conveyed to a trustee who is regarded as the agent of both debtor and creditor; and thus the deed of trust becomes a self executing instrument. But the character of the instrument in a Court of equity is not anywise different from the common law mortgage. The title is conveyed to the trustee. It is enforceable in courts of equity and especially the Federal courts of equity. It is enforceable and is frequently enforced in the Federal Courts of Equity in the Fourth Judicial Circuit just as a common law mortgage is enforced. We fail to get the conception of counsel for petitioner that there can be any material difference in determining the contest in this case between a common law mortgage and a common law deed of trust, although that deed of trust may in modern years be modified some by statute.

So far as we have examined the numerous cases cited as against the Massachusetts rule, and we confess that we have not examined all of them, though they vary some from the Massachusetts rule, yet they do hold to this doctrine notwithstanding the insistence of counsel; that when a fixture can be removed it must be apparent beyond question and beyond doubt that it can be removed without material injury, before the seller can enforce his conditional sale or his lien as against the prior real estate mortgage.

At this point we insist also that the provision for after-acquired property would be meaningless unless

that mortgage opened up to receive after-acquired property when it had been installed upon the freehold which was subject to the prior mortgage. We might go this far by way of concession, that if a chattel may be removed without material injury it is possible to enforce it; but we can not concede that proposition, and will not because the authorities do not support it. We do insist that before a chattel can be removed from a plant it must first be susceptible of being removed easily and without material injury to the plant; and also it must be susceptible of being removed without destroying the integrity of the plant. In this case it is clearly proven that the tanks were necessary to the plant as a going concern, and that they could not be removed without material injury to the plant and without destroying the integrity of said plant; especially in view of the conduct of the Detroit Steel Cooperage Company in furnishing the chip tanks and installing them, and its failure, after the same were delivered upon the ground and into the possession of the Brewing Company, to collect the cash payment of \$2,000. This indicates that the chip tanks were to not only go into the brewery, but to become a fixed and permanent part thereof. That fact alone is a waiver of their right to remove the same, if no other fact existed.

Counsel have endeavored to show that the material injury meant is physical-material injury to the physical part of the plant. That is not the rule at all. The material injury means not only physical injury, but it means injury to the concern as a complete and going plant.

The fact, if it be a fact, as stated by counsel for petitioner that the Massachusetts rule is not sustained by some of the other States, and especially Wisconsin,

causes no trepidation nor fear. Counsel attempted to distinguish, when discussing the Massachusetts rule, between mortgages and deeds of trust. We have already discussed that difference, and desire to spend no more time upon it; nor do we care whether it be admitted or not that the Supreme Court of Wisconsin has adhered to what counsel called the "Majority Rule" for fifty or even sixty years. However in opposition to that statement of counsel for petitioner, we desire to quote the following from the case of *Tippett & Wood vs. Barham*, 180 Federal, 76:

"This is what is generally known as the Massachusetts rule, and it has been affirmed by many other courts of last resort, and particularly by the Supreme Court of the United States in several cases hereinafter separately referred to."

And in support of that language the Court cites the following cases:

Pennock vs. Coc, 23 Howard, 117;

Galveston, etc. R. R. Co. vs. Cordrey, 11 Wall., 459;

Branch vs. Jesup, 106 U. S., 478;

Thompson vs. Whitewater Valley R. R. Co., 132 U. S., 68;

Porter vs. Pittsburg Bessemer Steel Co., 122 U. S., 282;

Union Trust Co. vs. Southern Sawmills Co., 166 Fed., 193.

In further support of the principle above laid down we desire to cite the following from the case of *Toledo, etc. R. R. Co. vs. Hamilton*, 134 U. S., 418, being syllabus No. 2, and is as follows:

"A recorded mortgage given by a Railroad Company on its road bed and other property creates

a lien whose priority can not be displaced thereafter directly by mortgage given by the Company, nor indirectly by a contract between the Company and a third party for the erection of buildings or other work of original construction."

Counsel for petitioner say, on page 38 of their brief, that at all events the reason of the Massachusetts rule is manifest; and that reason if regarded, must preclude the adoption of that rule in West Virginia, even if such cases as *Hurthall vs. Hurthall*, and *First National Bank vs. Hyer* can be laid aside. This is a gentle kind of surrender by counsel of these two last cases, and in as much as they have referred to the common law mortgage in Massachusetts as applying in part in this case as against the trust mortgage in West Virginia, we must reply again that while common law mortgages are not used so frequently as deeds of trust, yet they are used; and counsel for respondents in this case have foreclosed common law mortgages in the State of West Virginia more than once or twice, and they are just as valid as they ever were. The only purpose for using deeds of trust more frequently than mortgages is that they are self executing through the medium of the trustee, but the title nevertheless is in the trustee, and for all purposes is as effectual as a mortgage. Take it for granted that, as shown by the record, the landholders in this case were secured by a deed of trust, or as we frequently call it, a trust mortgage providing for its application to after-acquired property, they were just as thoroughly secured as though that trust had been, instead, a complete common law mortgage. Why counsel try to make that distinction we are at a loss to tell, and cease to attempt it.

Counsel for petitioner next take up and discuss certain Federal decisions and certain decisions of the Supreme Court of the United States. The first one relied upon is the case of *United States vs. New Orleans R. R.*, 12 Wall., 326, where it was held that a railroad mortgage with after-acquired property clause could not operate against a subsequent seller of rolling stock who had reserved title until the payment of the purchase price, even though his contract was not recorded. We fail to understand why counsel cite this case. It is construed, and is shown in a statement of the case that the mortgage was executed upon rolling stock, to wit, engines, locomotives, which were loose and not attached, and might have been run off on a switch or on an adjoining railroad; and the court makes a clear distinction between rolling stock which may be taken off the railroad, and rails, spikes, and other things permanently fixed, and uses the following language, on page 326 of said case; as follows:

"Had the property sold by the government to the Railroad Company been rails as in the case of *Railroad Co. vs. Cordrey*, or any other material which became fixed to and a part of the principal thing, the result would have been different; but being loose property susceptible of separate ownership and separate liens, such liens if binding upon the railroad itself are unaffected by a prior general mortgage given by the Company and paramount thereto."

In this case we insist, and the evidence shows clearly that the tanks are a part of the principal thing, to wit, the brewery, and that if removed the integrity of the plant would be destroyed.

On page 43 of their brief, counsel for petitioner speak at length concerning *quasi public corporations* and the affect corporations of this kind have upon certain decisions.

In regard to that matter we simply answer that a number of the parties interested in litigation of this kind have been public service corporations, but that the decisions rendered were not based on the fact that the parties were *quasi* public corporations, but rather on the fact that the property involved was a material and integral part of the plants or railroads, as the case might be.

In the case of *Tippett & Wood vs. Barham, supra*, while it might be inferred from the opinion of the court that the Water Works Company was a *quasi* public corporation, yet the opinion of the court was not based on that fact and had no relation to that fact; but was based on the fact that the standpipe was an essential part of the water works system, without which the Water Works Company could not have furnished water to its customers.

In the case of *Union Trust Co. vs. Southern Sawmills Co.*, 166 Fed., 193, it will hardly be contended that the defendant Sawmill Company was a *quasi* public corporation, yet the court in its opinion sustained and affirmed the Massachusetts rule.

Counsel for petitioner on page 44 of their brief lay down the principle that "In the cases in which the after-acquired property clause has been accorded superior, the after-acquired property was of such character and was employed in such manner that it became

an integral part of the realty and lost its separate identity." A part of this we admit, and a part we deny. It is a fact that in this case the after-acquired property became an integral part of the realty, but it does not follow that this property lost its identity.

In the case of *Tippett & Wood vs. Barham*, *supra*, the standpipe became an integral part of the water works system, yet it did not loose its identity as such.

In the case of *Railroad Company vs. Cowdrey*, *supra*, the rails furnished by the plaintiff could readily have been distinguished and determined, and could have been removed without any great trouble.

In the case of *Porter vs. Pittsburg Steel Co.*, *supra*, it can not be presumed that the railroad bridges lost their identity as such. It is a fact that these bridges were an integral part of the railroad system, yet it would not have been impossible nor even difficult to distinguish the bridges in controversy from the remainder of the railroad, and they could have been removed had the court permitted such to be done.

On page 45 of brief of counsel for petition, an illustration is given of a "standpipe, a ponderous structure of steel, perhaps one hundred feet in height, sunk into the earth twenty feet and imbedded in concrete." We presume that counsel is attempting by a very subtle and evasive argument to infer that the standpipe in the case of *Tippett & Wood vs. Barham* was "sunk into the earth twenty feet and imbedded in concrete," as that seems to have been the only standpipe mentioned

in this cause. However, counsel has failed to note the facts as set forth in the case, which are as follows:

“The standpipe in question was erected *upon a foundation*, which is supposed to be twenty-five feet in diameter and ten feet in depth, and is attached to this foundation by anchor bolts ten feet in length and two feet in diameter. These anchor bolts are imbedded in the foundation.”

The standpipe in that case was not, nor was a standpipe in any other case cited, sunk into the earth twenty feet. The bolts were imbedded in concrete, but an analysis of the case shows that the standpipe was fastened to the bolts simply by taps; and all that was necessary to remove the standpipe was to unscrew the taps.

On page 46 of their brief, counsel for petitioner in discussing the case of *Porter vs. Pittsburg Steel Company*, 122 U. S., 267, said that “it is apparent that the bridges were not brought upon the land accompanied by a reservation of title, but were constructed on the incumbered land by means of material furnished and labor performed.” In that connection we wish to state that the record discloses that the tanks in controversy in the case at bar were not brought upon the land of the Sistersville Brewing Company accompanied by a reservation of title, but that the reservation of title in this case was not placed on record in Tyler County, in which County the said brewery was located, for more than four months after the tanks were installed. The petitioner might have brought these tanks on to the realty belonging to the Sistersville Brewing Company accompanied by a reservation of title, but it failed

to insist upon a performance of the contract, and sent its workmen to Sistersville and installed the tanks in question without recording its contract or insisting on the cash payment.

In further discussing this case counsel speaks of the great difficulty in removing a railroad bridge. We have referred to this matter before and again insist that as a railroad bridge is held in place by its own gravity and the rails binding it to the adjacent track, the difficulty of removing a bridge of this kind would be far less than that of tearing down and dismantling a permanent brick wall of the nature of that which enclosed the tanks in controversy.

Counsel for petitioner cite the case of *Fosdick vs. Schall*, 99 U. S., 239, and in regard to the same we wish to state that we have no quarrel whatever with the rule laid down in said cause. This case simply follows the case of *U. S. vs. New Orleans R. R. Co.*, *supra*. The matter in controversy in this case, like the New Orleans case, is certain railroad cars. The court holds that these cars are loose property susceptible of separate ownership, and in support of that proposition cites *U. S. vs. New Orleans R. R. Co.*, *supra*.

In the case of *Bearlake Irrigation Co. vs. Garlan*, 164 U. S., 1, quoted by counsel for petitioner on page 41 of their brief, we find on examination that the title to the land, or the right of way, constructed thereon, never vested in the Bearlake Irrigation Company until the completion of the irrigation ditches; and as title did not vest until the completion of the work the court holds that when the Bearlake Company took title it was

burdened with the lien of the contractor. The court further in its opinion says that its decision is entire harmony with the principle laid down in the case of *Galveston, etc., R. R. Co. vs. Cowdrey*, 78 U. S., 11, which case we have commented upon heretofore.

On page 51 of brief for petitioner, much is said by way of criticism of the case of *Pippett & Wood vs. Braham, supra*. It is said that the standpipe was "not brought upon the land accompanied by a reservation of title, but constructed on incumbered land." We presume that counsel means to infer that the chip tanks in controversy in the case at bar were brought upon the property of the Sistersville Brewing Company accompanied by a reservation of title, but the record in this case will specifically show that such reservation of title was not recorded for more than four months after the said tanks were delivered at Sistersville and installed in the plant of the said Brewing Company. Again the court in delivering its opinion makes no mention whatever of the fact that the Water Works Company was a *quasi public* corporation, and that fact is not considered either directly or indirectly, and no part of the decision is based on the same.

"LOOSE PROPERTY."

On page 53 of the brief of counsel for petitioner, they attempt to lay stress upon what they call "Loose Property," within the meaning of the decisions of some of the Courts.

Counsel for petitioner seem to think that the lower Federal Courts have fallen in great measure into a misunderstanding of the true meaning of the words "Loose

property" as employed in the case of *U. S. vs. New Orleans Railroad Co.*, and in the case of *Porter vs. Pittsburgh Steel Co.*, *supra*.

We understand, in the case of *U. S. vs. New Orleans R. R. Co.*, that the court there, by Mr. Justice Bradley, was speaking essentially and wholly of rolling stock, being locomotive engines and cars. Now, they were certainly "loose property," that is, they could be run and it was contemplated that they should be run without any attachment to the railroad; and Mr. Justice Bradley in his opinion makes a very clear distinction as to what is "loose property."

In the case of *Porter vs. Pittsburgh Steel Co.*, Mr. Justice Blatchford makes a clear distinction between locomotives, cars, and loose property susceptible of separate ownership and separate liens and real estate not used for railroad purposes, as to their being unaffected by a mortgage given by a Railroad Company covering after-acquired property, and held that rails and other articles which become affixed to and part of a railroad covered by a prior mortgage are held by the lien of said mortgage in favor of *bona fide* creditors as against any contract between the furnisher of property and the Railroad Company containing stipulations like those in the contract in the case he was considering.

Counsel, by the phrase of "loose property," think it clear that the court intended to do no more than point out the distinction which it has enforced in all of its decisions between property retaining a separate identity and subject to separate lien on the one hand, and property mortgaged with the real estate on the other.

As to that, we emphatically deny the proposition laid down by counsel, "that property is none the less loose property because it does not contain within itself its own power, such as locomotives and cars. All property necessarily used in a plant of any kind, such as a Steel Works, Iron Works, Breweries, etc., is permanent both as to the buildings and machinery. In no sense are the engines, tanks, vats, tubs, and all other things used in the manufacture of beer, to be denominated "loose property."

If these tanks in controversy were "loose property," then the engine used in that brewery was "loose property," as also the vats, the refrigeration system, the tubs, the bottling machinery, and all other things used in connection with the manufacture of beer, from its inception until ready for sale.

Counsel for petitioner certainly indulged in a unique line of reasoning when they interpreted the term "loose property" to include the tanks in controversy.

On page 54, counsel for petitioner reach the conclusion that the distinction between loose property and other property is as to whether or not the property in question retains a separate identity and is susceptible of separate lien, or is physically merged with the real estate. Fortunately a court has been called upon to interpret the term "loose property." In Tennessee a testator by his will bequeathed all of his "loose property" to certain heirs; and the Supreme Court of Tennessee was called upon to interpret that term. This interpretation is found in the case of *Fry vs. Shipley*, 94 Tenn., 232; and the court in brief says:

"The term 'loose property,' corresponds with the terms 'movables.' "

In Websters' Dictionary, the term "loose property," is defined as "*property not fastened or confined.*"

The court, in the case of *U. S. vs. New Orleans R. Co.*, *supra*, evidently had this idea in mind when it applied the term "loose property" to railroad cars. These cars were neither fastened nor confined; and as was said in the Tennessee case, are "movable." The same can be said of the case of *Fosdick vs. Schall*, *supra*, in which the court likewise applied the term "loose property" to the rolling stock of a railroad. Certainly the tanks in controversy in the case at bar cannot be termed "loose property," because they are not movable and are confined. To remove them it would be necessary to tear away and remove a substantial brick wall, and they are confined within the walls of the brewery.

On page 58, under Proposition 4, counsel assert; that the proposition that the petitioner is precluded from asserting its title to the tanks because they are necessary to the operation of the brewery, is without merit. Counsel argue at length concerning the fact that the petitioner has not been paid for the tanks in controversy, and that some one is attempting to secure property without paying for it.

In that connection, counsel for respondents desire to state that the respondents in this cause are not indebted to the petitioner in any sum of money whatever, and have entered into no contract with the petitioner either directly or indirectly. The petitioner contracted with the Sistersville Brewing Company, and not with the bondholders. Again, it might be said in that connection that if the petitioner had exercised due diligence and had complied with and had compelled the perform-

ance of the terms of its contract with the Sistersville Brewing Company, it would not need to complain at this late day that it had not been paid for its property.

It is asserted on page 61 of brief for petitioner, that "in the case at bar the facts are undisputed that the removal of the tanks would not diminish the value of the mortgage security as it existed at the time when the mortgage was executed." In that connection we wish to ask, what is the measure of the damages to the bondholders? In the case of *Hurxthal vs. Hurxthal*, 45 W. Va., 584, on which counsel for petitioner rely so strongly, the court, in speaking of the mill and the property placed therein under a conditional sale, said:

"The court should have directed the commissioner to offer them for sale both separately and together, and sell in the way in which they would bring the larger sum. If together they bring a larger sum than when offered separately, the difference between the two sums will show the amount to which the realty mortgagee would be damaged by a separate sale; while the personal mortgagee would be only entitled to what the personal property would bring if sold separately, because such is the extent of his mortgage."

That is the rule by which the court determines the damage to the mortgagee, and by considering that rule of law together with the bids received for the said brewery at the public sale conducted by the receiver (record page 203) it can easily be seen that the removal of these tanks would result in a great injury to the bondholders.

Counsel for petitioner on page 71 of brief indulged in a further criticism of the decision rendered in this

cause by Mr. Justice Boyd when it was pending in the Circuit Court of Appeals. However, the court in its opinion says that there are but two questions presented by the record which become necessary for determination, namely:

“The first is whether the tanks referred to are fixtures; and, second, if they are held to be fixtures, does the reservation of title in a contract between the Cooperage Company and the Brewing Company as security for the purchase money entitle the vendor to retake the tanks or to have a preference over the lien of the bondholders for the unpaid balance of the purchase price in the distribution of the proceeds of the sale of the brewery.”

Those were the only points considered by the court, or that it was necessary to consider, and on those points we submit that the court in its opinion decided correctly and according to the weight of authority.

In conclusion we submit that in consideration of the character of the annexation to the freehold and the injury that would be occasioned by the removal of the tanks; the authority cited and other grounds set forth in counsel's brief and reply brief, that the decree of the Circuit Court should be affirmed.

Respectfully submitted,

ARLEN G. SWIGER,
THOMAS P. JACOBS,
Counsel.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1912.

No. 828.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BUFFALO PITTS COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Transcript from the Circuit Court of the United States for the Western District of New York.....	1	1
Petition.....	1	1
Chattel mortgage.....	7	7
Answer.....	12	12
Decision and finding.....	14	14
Exceptions to finding.....	21	21
Judgment.....	26	26
Bill of exceptions.....	27	27
Evidence for plaintiff.....	28	28
Chattel mortgage.....	28	28
Testimony of Wendell M. Reed.....	33	33
George Hockenhull.....	34	34
John B. Olmsted.....	43	43
Elzer D. Anderson.....	56	56
Augustus T. Renfroe.....	57	57
U. F. Short.....	58	58
Motion for dismissal.....	58	58
Evidence for defendant.....	60	60
Testimony of Wendell M. Reed.....	60	60
Laws of New Mexico.....	64	64
Motion to dismiss renewed.....	65	65
Stipulation as to bill of exceptions.....	66	66
Judge's certificate to bill of exceptions.....	67	67

Transcript from the Circuit Court of the United States for the Western
District of New York—Continued.

	Original.	Print.
Assignments of error.....	68	68
Order allowing writ of error.....	76	76
Petition for writ.....	77	77
Writ of error.....	79	79
Citation.....	80	80
Stipulation as to papers.....	82	82
Order enlarging time to forward record, etc.....	83	83
Certificate of clerk.....	84	84
Opinion.....	85	85
Judgment.....	95	95
Petition for rehearing.....	97	97
Order denying petition for rehearing.....	107	106
Petition for writ of error.....	108	106
Order allowing writ of error.....	110	107
Assignment of errors.....	112	108
Clerk's certificate.....	114	109
Writ of error.....	119	109
Citation and service.....	121	109

United States Circuit Court.

WESTERN DISTRICT OF NEW YORK.

1

BUFFALO PITS COMPANY,

Plaintiff,

AGAINST

UNITED STATES OF AMERICA,

Defendant.

Petition.

To the Honorable Judges of the Circuit Court
of the United States for the Western District
of New York:

The petition of the Buffalo Pits Company, by
its attorneys, Messrs. White & Babcock, respec-
tfully shows upon information and belief:

FIRST: That your petitioner, the Buffalo
Pits Company, is a domestic corporation duly
created and organized under the laws of the State
of New York, that its full name is as aforesaid
and that its residence, so far as such corporation
may have a residence, and its principal place of
business is at the corner of Fourth and Carolina
Streets, in the City of Buffalo and State of New
York.

3

4 SECOND: That your petitioner makes claim against the Government of the United States and brings its suit pursuant to the provisions of an Act of Congress, approved March 3, 1887, and the acts amendatory thereof, which claim is founded upon the facts hereinafter stated, and the contract arising therefrom and is brought to recover damages in a case not coming in tort.

5 THIRD: That prior to the 20th day of May, 1886, your petitioner was the owner of a valuable engine which it had manufactured for sale, to wit: a Buffalo Pitts 33 horse power double cylinder, special traction engine, No. 1012, with the usual apparatus and equipment, and that on or about said 20th day of May, 1886, your petitioner delivered said engine to the Texas Marine Construction Company at or near the town of New York in the County of Chavon and Territory of New Mexico under an agreement of sale by the terms of which the said Construction Company accepted and delivered to your petitioner a chattel mortgage upon said engine and appurtenances as security for part of the purchase price thereof in the amount of sixteen hundred dollars (\$1,600.00) payable in installments with interest as set forth in said mortgage, which expressly provided, among other things, that if default should be made in the payment of said sum of money or the interest thereon, or if said mortgagee should at any time deem itself unsafe or insecure, the whole amount should be considered immediately due and payable, and your petitioner was

authorized to take and remove said property and hold or sell and dispose of the same and all equity of redemption as more fully set forth in said mortgage, a copy of which is hereto annexed and made part of this petition.

That on or about the 22nd day of May, 1906, at 9:30 A. M., the said chattel mortgage was duly filed for record and recorded in the office of the Probate Clerk and ex officio Recorder in and for the said County of Chaves and Territory of New Mexico, and thereby due notice was given according to law unto the Government of the United States and all persons interested in regard to the rights of your petitioner in said property.

That within a few days thereafter the said engine was put to work by said Taylor Moore Construction Company upon the so-called Hanks Pocket being part of the Reclamation Section undertaken by the Department of the Interior of the United States which work was being prosecuted under a contract between the United States and said Taylor Moore Construction Company, dated November 6, 1905.

That the said Construction Company on or about the 5th day of June, 1906, having become insolvent, assigned to the United States all its interest in said contract, and the United States on that date took possession of all material, supplies and equipment belonging to said Construction Company, including the aforesaid engine and appurtenances, under the provisions of said contract, but subject to the rights reserved to your petitioner by said chattel mortgage.

12 That the said mortgagor thereby and by its other
acts and omissions in the premises made default
in the conditions of said mortgage, and the mort-
gagee thereby was rendered and deemed itself
unsafe and insecure in respect to the money owing
for such property, and so became entitled to the
possession thereof, and thereupon your petitioner
lawfully demanded from the United States through
its proper representatives the return of said
13 engine to your petitioner, but the representatives
of the United States being desirous of continuing
the use of said engine in the completion of said
work, refused said demand and put off the re-
turn of said engine, at the same time stating to
your petitioner's agent that in their opinion the
Government would do what was right in the mat-
ter, and within a few days either give up pos-
session or pay your petitioner what was due upon
14 the engine.

That relying upon such representations your
petitioner waited until the month of September,
1905, when an agent of your petitioner was sent
to said town of Roswell, N. M., with instructions
to take the property in charge and advertise and
sell it in the manner provided by the mortgage,
and upon arrival at said place said agent had an
15 interview with the representative of the Govern-
ment having the matter in charge, who requested
that no action be taken looking to the recovery
of the property, but that it be permitted to remain
in the use of the Government in order to accom-
plish the work which had been left undone by the

Construction Company, and represented that if 16
the Government were permitted to use it the Government would pay for the property, because its use was necessary and probably indispensable in the work to be done.

That accordingly your petitioner complied with said request and permitted said property to remain in the possession of the Government, and the same was used by the Government in the completion of said work, and was not returned 17
to your petitioner until on or about the 21st day of June, 1906.

That the fair market value of said engine and appurtenances at the time it was taken by the Government as aforesaid was eighteen hundred and twenty dollars (\$1,820.00) and the fair market value of the same property when returned by the Government to your petitioner as aforesaid was not more than five hundred dollars (\$500.00). 18
That the fair and reasonable value of the use and occupation of said property in the meantime was thirteen and twenty dollars (\$1,320.00) and by reason of the facts stated your petitioner has suffered damage in said amount, with interest thereon from June 21, 1906, no part of which has been paid.

That the said Taylor Moore Construction Company made default in respect to each and every 19
payment required by said chattel mortgage and no part thereof has been paid.

WHEREFORE, your petitioner prays for judgment upon the facts and law and for a recovery

20 against said United States of the sum of thirteen hundred and twenty dollars (\$1,320.00) with interest at eight per cent. (8%) from June 21, 1906, besides the costs and disbursements of this action.

BUFFALO PITTS COMPANY,

Petitioner,

By WHITE & BABCOCK,

21

Attorneys for Petitioner,
Office and P. O. Address
100 Erie Co. Bank Bldg.,
Buffalo, N. Y.

STATE OF NEW YORK, }
COUNTY OF ERIE, } ss.:
City of Buffalo.

22 CHARLES M. GREINER, being duly sworn says that he is an officer of the above-named petitioner, Buffalo Pitts Company, namely its president, that the foregoing petition is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES M. GREINER,

23

Subscribed and sworn to before me
this 28th day of June, 1910.

JENNIE W. RUSSELL,
Notary Public.

CHATTEL MORTGAGE.

24

TAYLOR-MOORE CONSTRUCTION COM-
PANY TO BUFFALO PITTS
COMPANY.

This indenture made and entered into this
day of May in the year one thousand nine hun-
dred and five by the Taylor-Moore Construction
Company of the Town of Roswell, County of
Chaves, Territory of New Mexico, mortgagor, to 25
Buffalo Pitts Company, a body corporate under
the laws of the State of New York, mortgagee,
WITNESSETH, that the Mortgagor being justly in-
debted to the Mortgagee in the sum of sixteen
hundred no/100 dollars, which sum is hereby con-
fessed and acknowledged to be due and payable
by the Mortgagor to the Mortgagee, over and
above all offsets and counterclaims, have for the
purpose of securing the payment of said debt or 26
debts, granted, bargained, sold, and mortgaged,
and by these presents do grant, bargain, sell, and
mortgage unto the said mortgagee, its succes-
sors and assigns, all that certain personal prop-
erty described as follows; to wit, also One Buf-
falo Pitts 22 H. P. Special Traction Engine, Com-
plete, shop number 6659, with main drive belt,
trucks, hose, and all fixtures and appendages with
or belonging to the same, which said above de- 27
scribed property at the date these presents, is in
possession of said party of the first part, and is
now situated in the Town of Roswell, County of
Chaves, Territory of New Mexico, and is free of
all liens, conveyances, incumbrances, and levies,

28 and so stated this day, all the said property being
 now in the possession of said Mortgagor, in the
 County of Chaves and State aforesaid, and free
 from all incumbrances. To have and to hold all
 and singular, the personal property aforesaid,
 forever, as security for the payment of the notes
 and obligations hereinafter described. Provided,
 always, and these presents are upon this express
 condition, that if the said Mortgagor shall pay
 29 or cause to be paid unto the Mortgagee, its suc-
 cessors or assigns, the sum of sixteen hundred
 no 100 dollars according to the conditions of
 seven certain promissory notes payable to the
 Buffalo Pitts Company, viz:

One note dated May, 1905, due June 20, 1905,
 for \$250.00 and interest.

One note dated May, 1905, due July 20, 1905,
 30 for \$250.00 and interest.

One note dated May, 1905, due August 20, 1905,
 for \$250.00 and interest.

One note dated May, 1905, due September 20,
 1905, for \$250.00 and interest.

One note dated May, 1905, due October 20, 1905,
 for \$250.00 and interest.

One note dated May, 1905, due November 20,
 31 1905, for \$250.00 and interest.

One note dated May, 1905, due December 20,
 1905, for \$100.00 and interest.

And any and all renewals and extensions there-
 of, in which is stipulated that if not paid when

due, then it shall become due and payable at Hours 32
 ten, Harris County, Texas, and which is the ob-
 ject of this Mortgage to secure, and shall perform
 and fulfill the conditions herein contained, then
 these presents to be void and of no effect, but if
 default shall be made in the payment of said sum
 of money or the interest thereon, at the time the
 said notes shall become due, or if any attempt
 shall be made to dispose of or injure said prop-
 erty or to remove said property from said County 33
 of Caves, or any part thereof, by said Mortgagor
 or any other person, or if said Mortgagor does
 not take proper care of said property, or if said
 Mortgagee shall at any time deem itself unsafe
 or insecure, then the whole amount of said money
 in said notes mentioned which shall not have been
 paid, shall be considered immediately due and
 payable, and the said party of the second part
 its successors or assigns, shall have right and be 34
 entitled to declare all of said notes due and pay-
 able, anything in said notes to the contrary not-
 withstanding, and then, thereupon and thereafter,
 it shall be lawful, and the said Mortgagor hereby
 authorizes said Mortgagee, its successors, or as-
 signs, or its or their authorized agent, to take said
 property and enter on the premises wherever the
 same be found, to take and remove the same, and
 hold or sell and dispose of the same and all equity 35
 at redemption at public auction, with notice as
 provided by law, and on such terms and at such
 places as said Mortgagee or its agent may see
 fit, and said Mortgagee may become the purchaser
 of said property at sale, retaining said amount

- 36 as shall pay the aforesaid notes and interest thereon, and an attorney fee of fifteen dollars and all charges, costs expenses of pursuing, searching for, taking, removing, storing, and selling said described property, returning the surplus money, if any there may be, to the said Mortgagor, or his assigns, and the said Mortgagor hereby waives demand and personal notice of the time and place of sale. And it is further provided and agreed,
- 37 that if the proceeds of said sale after all expenses as above specified shall have been fully paid, do not amount to a sufficient sum necessary to cancel the whole debt and interest thereon, then and in that case the said Buffalo Pitts Company are hereby authorized and empowered to endorse amount on any or all notes representing said debt, as they in their judgment may elect to do and the said parties of the first part hereby waive
- 38 any appraisement and any and all relief from any valuation or appraisement laws.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

THE TAYLOR-MOORE CONSTRUCTION Co. (Seal)

By J. WILL GILLIAM, (Seal)

39

TERRITORY OF NEW MEXICO, } ss:
COUNTY OF CHAVES.

Before me the undersigned authority, a notary public within and for the County and State aforesaid, duly commissioned and qualified, personally

appeared J. Will Gilliam, Secretary-Treasurer of 40
the Taylor-Moore Construction Company, personally known to me to be the same person whose name is subscribed to the foregoing and within instrument of writing and acknowledged to me that he executed the same freely and voluntarily for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office, this 41
20th day of May, A. D., 1905.

(Name)	SUDYE J. SMITH.
(Title of office)	<i>Notary Public,</i>
(Notarial Seal)	Chaves County, N. M.

Filed for record, May 22nd, 1905, at 9:30 A. M.,
F. P. Gayle, Recorder, by R. F. Ballard, Deputy.

TERRITORY OF NEW MEXICO, } 42
COUNTY OF CHAVES. } ss:

I, F. P. Gayle, Probate Clerk, and ex-officio Recorder, in and for the County of Chaves and Territory aforesaid, do hereby certify that the annexed copy of chattel mortgage recorded in chattel mortgage record J, at pages et seq., records of Chaves County, N. M., is true and literal exemplification from the record in this office. Wit- 43
ness my hand and seal of office on this the 23rd day of June, 1905.

F. P. GAYLE.

Probate Clerk and Ex-officio Recorder,

By R. F. BALLARD, *Deputy.*

44 UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

THE UNITED STATES OF AMERICA,

Defendant.

Answer.

45

The United States of America, by John Lord O'Brian, United States Attorney in and for the Western District of New York, upon its information and belief, answers the petition of the plaintiff herein as follows:

46 L. Admits that the Buffalo Pitts Company, the plaintiff herein, is organized and has its place of business as in said petition set forth; that the Taylor Moore Construction Company had a certain contract with the United States of America, the defendant herein, through its Department of Interior, for certain reclamation work in the Territory of New Mexico; that on or about June 7th, 1905, the United States of America suspended the Taylor Moore Construction Company from
47 Work on and under such contract and took possession of all supplies, materials and equipments of said Company then on said work, including the so-called Buffalo Pitts' engine mentioned in said petition, pursuant to the provisions of the contract aforesaid and thereupon and thereafter completed

the work thereunder by and with the use, aid and 48
assistance of the said supplies, materials and
equipments, including the said engine.

2. Denies that it has any knowledge or infor-
mation sufficient to form a belief as to any mat-
ters or things in said petition alleged or con-
tained not hereinbefore specifically admitted.

WHEREFORE, the said defendant demands judg-
ment dismissing the petition of the plaintiff here- 49
in, with costs.

Dated Buffalo, N. Y., October 26th, 1910.

THE UNITED STATES OF AMERICA,

Defendant and Respondent.

By JOHN LORD O'BRIAN,

United States Attorney in and 50
for the Western District of
New York,

405 Federal Building,
Buffalo, N. Y.

WESTERN DISTRICT OF NEW YORK, }
STATE OF NEW YORK, } ss.:
County of Erie.

51

JOHN LORD O'BRIAN, being duly sworn, deposes
and says: That he is the Attorney of the United
States in and for the Western District of New
York; that he has read the foregoing answer and
knows the contents thereof; that the same is true

52 of his own knowledge, except as to the matters therein stated to be upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent, and not by the United States of America, is that the said United States of America is a sovereign corporation.

53

JOHN LORD O'BRIAN,

Sworn to before me this
26th day of October, 1910.

LEROY N. KULMAN,

Notary Public

in and for Erie County, N. Y.

54

UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,

Plaintiff.

AGAINST

55 UNITED STATES OF AMERICA,

Defendant.

Decision and Finding.

The issues of fact coming on to be tried by the Court at a regularly appointed term held by the

undersigned, without a jury and having been tried 56
on the 9th day of February, 1911, and the alle-
gations and evidence of the parties having been
heard; now, after hearing White & Babcock for
the plaintiff and William Palmer, Esq., for the
defendant, and due deliberation having been had,
I decide and find as follows:

I. That the plaintiff, Buffalo Pitts Company,
is and was at all the times mentioned in the peti- 57
tion and complaint a corporation organized under
the laws of the State of New York, having its
principal place of business at the City of Buf-
falo, N. Y., and being engaged in the manufacture
and sale of agricultural implements and other ma-
chinery, including traction engines and their ap-
purtenances.

II. That on or about May 20, 1905, the plain- 58
tiff sold and delivered to the Taylor-Moore Con-
struction Co. at Roswell, New Mexico, where it
had its principal place of business, a Buffalo Pitts
22 horse-power traction engine, shop No. 6659,
with the appurtenances, for the price of \$1,820
and then and there took back a chattel mortgage
from said Taylor-Moore Construction Co. to
secure the payment of \$1,600 of the purchase
price, receiving in addition \$145.40 in cash, and 59
the said Construction Company paying freight
charges for the transportation of said engine
amounting to the balance.

III. That said chattel mortgage conveyed said
engine and property to the plaintiff upon condi-

60 tion that if the said mortgagor should pay the sum of \$1,600 according to the conditions of seven certain promissory notes payable to the Buffalo Pitts Company, the first of which became due June 20, 1905, and should perform and fulfill the conditions therein contained, then the said indenture should be void and of no effect, but if default should be made in payment as aforesaid, or if any attempt should be made to dispose of or
 61 injure said property or to remove said property from said County of Chaves or any part thereof, by said mortgagor or any other person, or if said mortgagor should not take proper care of said property, or if said mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable, and then, thereupon and thereafter it should be lawful for the said mort-
 62 gagee to take said property and enter on the premises wherever the same be found, to take and remove the same and hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law. That said mortgage was duly filed for record in the office of the Recorder of said County of Chaves on May 22, 1905, at 9:30 A. M., and no part of the money thereby secured was ever paid to said mort-
 63 gagee which has ever since been the owner and holder of said mortgage.

IV. That thereupon the said engine was put to work by said Taylor-Moore Construction Co. upon the so-called Hondo Project, being part of

the reclamation service undertaken by the Department of the Interior of the United States which work was being prosecuted under a contract between said defendant and said Taylor-Moore Construction Co., the said engine being located at or near Roswell, New Mexico. 64

V. That the said Construction Company having made default in the performance of its said contract on or about the 7th day in June, 1905, 65 was suspended from work thereunder, and then assigned to the United States all its interest in said contract, and the United States on that day took possession of all material, supplies and equipment belonging to said Construction Company, including the said engine and appurtenances, pursuant to and under the provisions of said contract with the United States.

VI. That on or about the 16th day of June, 1905, at Roswell, New Mexico, the plaintiff by its agent made a demand upon the defendant through Wendell M. Reed, District Engineer of the Reclamation Service under the Department of the Interior, for the possession of said engine and appurtenances, which the defendant then and there refused, and thereafter the defendant retained and used said property in the work under said contract until June 21, 1906. 66 67

VIII. That said Wendell M. Reed was during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Ros-

68 well, New Mexico, and as such took possession of
said engine and appurtenances for the United
States, and thereafter the defendant by the Di-
rector of the U. S. Geological Survey to whom
the Secretary of the Interior referred said mat-
ter, and by the Chief Engineer and Assistant
Chief Engineer of the Reclamation Service under
the direction of said Department, ratified and
adopted the acts of said Wendell M. Reed, Dis-
69 trict Engineer, in respect to the possession of
said engine and appurtenances.

VIII. That the value of said engine and ap-
purtenances at the time of said demand and re-
fusal was the sum of \$1,674.60 and the value there-
of when the defendant got through using the same
as aforesaid was reduced to \$500. That the en-
gine was then in bad condition, stripped of many
70 of its parts and greatly worn.

IX. That no part of the said mortgage has
ever been paid to the mortgagee and that the
mortgagor has never made any claim to the
property since the suspension and assignment of
said contract to the defendant as aforesaid.

X. That during the use and occupation of the
said engine and appurtenances by the defendant,
71 the plaintiff, to wit: on or about June 16, 1905,
and also on or about September 30, 1905, notified
the defendant of the execution and filing of said
mortgage as aforesaid and that the plaintiff
claimed the said property under the title thereby
vested in it and claimed the right of possession

because of the default by the mortgagor in the 72 conditions thereof, and that the defendant at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine in said work and that any legal proceedings to recover the possession thereof would be resisted and defeated by the defendant, and further 73 represented to the plaintiff that if said property were left in the defendant's possession its attorney would recommend payment by the defendant therefor.

XI. That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and 74 consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor.

XII. That the defendant after the completion of the work aforesaid surrendered the said property to the plaintiff, its fair and reasonable value at that time being \$500 as aforesaid.

75

CONCLUSIONS OF LAW.

I. That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defend-

76 ant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co., and its assigns.

II. That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property.

77

III. That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff.

IV. That the plaintiff is entitled to recover against the defendant the sum of \$1,174.60, with interest thereon from June 21, 1906, together with
78 the costs and disbursements of this action.

Dated Buffalo, N. Y., February 27, 1911.

JOHN R. HAZEL,
U. S. Judge.

UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

80

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

UNITED STATES OF AMERICA,

Defendant.

Exceptions to
Findings.

81

The above entitled action having been tried before the Honorable John R. Hazel, United States District Judge in and for the Western District of New York, on February 9, 1911, and the said Judge having thereafter and on February 27, 1911, made, signed and filed his decision and findings in writing, the United States of America, the defendant above named, hereby makes and files the following exceptions to the decision and findings aforesaid: 82

1. The said defendant excepts to the finding contained in said decision and numbered "VI," in the words and figures following:

"That on or about the 16th day of June, 1905, at Roswell, New Mexico, the plaintiff by its agents made a demand upon the defendant through Wendell M. Reed, District Engineer of the Reclamation Service under the Department of the Interior, for the possession of said engine and appurtenances, which the defendant then and there refused. 83

84 and thereafter the defendant retained and used said property in the work under said contract until June 21, 1906'';

and to each and every part thereof.

2. The said defendant excepts to the finding contained in said decision and numbered "VII," in the words and figures following:

85 "That said Wendell M. Reed was, during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Roswell, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant by the Director of the U. S. Geological Survey to whom the Secretary of the Interior referred said matter, and by the
86 Chief Engineer and Assistant Chief Engineer of the Reclamation Service under the direction of said Department, ratified and adopted the acts of said Wendell M. Reed, District Engineer, in respect to the possession of said engine and appurtenances'';

and to each and every part thereof.

87 3. The said defendant excepts to the finding contained in said decision and numbered "X," in the words and figures following:

"That during the use and occupation of the said engine and appurtenances by the defend-

ant, the plaintiff, to wit: on or about June 88
 16, 1905, and also on or about September 30,
 1905, notified the defendant of the execution
 and filing of said mortgage as aforesaid and
 that the plaintiff claimed the said property
 under the title thereby vested in it and
 claimed the right of possession because of the
 default by the mortgagor in the conditions
 thereof, and that the defendant at all said
 times well knew of the existence and filing 89
 of said chattel mortgage and did not at any
 time dispute the validity thereof, and on Sep-
 tember 30, 1905, represented to the plaintiff
 that the defendant was using and would con-
 tinue to use said engine in said work and that
 any legal proceedings to recover the posses-
 sion thereof would be resisted and defeated
 by the defendant, and further represented to
 the plaintiff that if said property were left in 90
 the defendant's possession its attorney would
 recommend payment by the defendant there-
 for";

and to each and every part thereof.

4. The said defendant excepts to the finding
 contained in said decision and numbered "XI,"
 in the words and figures following:

91

"That the plaintiff relied upon the fact
 that its title to the property under the chattel
 mortgage was not disputed by the defendant
 and upon the representations made to it as
 aforesaid and consented to defendant's re-

- 92 taining possession of said property in expectation of receiving due compensation therefor”;

and to each and every part thereof.

The said defendant also excepts to the conclusions of law contained in said decision and findings as follows:

- 93 1. The said defendant excepts to the conclusion of law contained in said decision and numbered “I,” in the words and figures following:

“That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defendant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co., and its assigns”;

94

and to each and every part thereof.

2. The said defendant excepts to the conclusion of law contained in said decision and numbered “II,” in the words and figures following:

- 95 “That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property”;

and to each and every part thereof.